

SOUTH AFRICA / JUDGMENT

Liberty Group Limited v Moosa (126/2021) [2023] ZASCA 52; 2023 (5) SA 126 (SCA) (14 April 2023) [2023] ZASCA 52

COURT

Supreme Court of Appeal

BEFORE

Ponnan, Mbatha, Mothle, Meyer, Molefe

CASE / FILE NUMBER

126/2021

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THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No:126/2021

In the matter between:

LIBERTY GROUP LIMITED APPELLANT and MOHAMMED SHAAZ MOOSA RESPONDENT

Neutral Citation: Liberty Group Limited v Moosa (126/2022) [2023] ZASCA 52 (14 April 2023)

Coram: PONNAN ADP and MBATHA, MOTHLE, MEYER and MOLEFE JJA

Heard: 17 March 2023

Delivered: 14 April 2023

Summary: Appealability – Insolvency Act 24 of 1936 – whether an order dismissing an application for provisional sequestration is an order of court in terms of s 150 and thus not appealable.

ORDER

On appeal from: KwaZulu-Natal Division of the High Court, Pietermaritzburg (Gani AJ, sitting as a court of first instance):

1 Leave to appeal is granted.

2 The appeal is upheld with costs, such costs to include the costs of the application for leave to appeal in both this Court and the high court.

3 In each instance, the costs shall include those of two counsel, where so employed.

4 The order of the high court is set aside and in its stead is substituted the following:

‘(a) The estate of the respondent is placed under provisional sequestration in the hands of the Master of the high court;

(b) The respondent is called upon to advance reasons, if any, on Tuesday 30 May 2023 at 10h00, why the court should not order the final sequestration of his estate.’

Ponnan ADP and Meyer JA (Mbatha, Mothle and Molefe JJA concurring):

[1] This is an application for leave to appeal and, if granted, the determination of the appeal itself. The two judges who considered the application referred it to oral argument in terms of s 17(2)(d) of the Superior Courts Act 10 of 2013. As it was put in *Body Corporate of Marine Sands v Extra Dimensions 121*(Marine Sands):

‘. . . Different considerations come into play when considering an application for leave to appeal as compared to adjudicating the appeal itself. As to the former, it is for the applicant to convince the court that it has a reasonable prospect of success on appeal. Success in an application for leave to appeal does not necessarily lead to success in the appeal. Because the success of the application for leave to appeal depends, inter alia, on the prospects of eventual success of the appeal itself, the argument on the application would, to a large extent, have to address

the merits of the appeal. Here, inasmuch as the appeal raises a point of statutory interpretation, the application had to succeed. On that score, the high court has spoken and, absent an appeal, those judgments will continue to apply. Future litigants are entitled to the benefit of this court’s view on the question. In the circumstances we considered it appropriate, at the hearing of the application, to grant leave to the applicant, who will henceforth be referred to as “the appellant”, to proceed with the appeal. That opens the door to a full consideration of the merits of the appeal itself.’ [1]

[2] As this matter also raises a point of statutory interpretation, the approach followed in *Marine Sands* commends itself in this instance as well. The question that we are required to resolve is whether an appeal against the refusal of a provisional order of sequestration is precluded by s 150(5) of the Insolvency Act 24 of 1936 (the Act). Section 150(5) reads:

‘There shall be no appeal against any Order made by the court in terms of this Act, except as provided in this section’.

Section 150(5) must be read with s 150(1), which provides:

‘Any person aggrieved by a final order of sequestration or by an order setting aside an order of provisional sequestration may, subject to the provisions of section 20 (4) and (5) of the Supreme Court Act, 1959 (Act 59 of 1959), appeal against such order.’

[3] The appeal lies against the order of Ganie AJ in the KwaZulu-Natal Division of the High Court, Pietermaritzburg (the high court) dismissing with costs the application by the appellant, Liberty Group Limited (Liberty), for the provisional sequestration of the estate of the respondent, Mr Mohammed Shaaz Moosa (Mr Moosa). The high court thereafter dismissed an application by Liberty for leave to appeal on the basis that its order is, in terms of s 150(5) of the Act, not appealable. In that, reliance was placed by the high court, inter alia, on the decision of Van Reenen J of the Cape Provincial Division in *Gottschalk*[2] and the Full Court of the Natal Provincial Division in *Lawclaims*. [3] Those decisions, in turn, found support for that proposition in *Bhamjee*, [4] a Full Court decision of the Transvaal Provincial Division, as well as the views of various textbook writers. [5]

[4] The question in this appeal, therefore, is whether the decision, which forms the subject of this appeal, is an 'order made . . . in terms of [the Act] . . .' If it is, no appeal lies. If not, the converse would be the case.

[5] In *Ex parte Crous* 1939 AD 334 at 335, Centlivres CJ stated:

'It will be sufficient for the purposes of this case to say that an appeal will lie, unless any law specially (uitdruklik) limits the right of appeal. For any such possible limitation we must look at Act 24 of 1936. Subsection (1) of s 150 of that Act grants a right of appeal against a final order of sequestration or an order setting aside an order of provisional sequestration. No mention is made of appeals against an order refusing an application for a provisional order of sequestration or voluntary surrender. The mere fact that s 150 is silent as to appeals from a refusal to accept voluntary surrender or a refusal to grant a provisional order of sequestration does not expressly negative the right of appeal in such cases.'

[6] Section 150(5) of the Act came to be inserted with effect from 6 April 1943, by way of s 35 of the Insolvency Law Amendment Act 16 of 1943. *Bhamjee* is the first reported decision to have had occasion to consider the effect of the amendment. In an all too brief judgment, it reached the conclusion, without more, that an appeal was effectively barred by ss 150(1) and (5). In that regard it held:

' . . . On the 25th November last year an application by the appellant for the provisional sequestration of the respondent's estate was refused by CLAASSEN, J. Against that order the appellant now appeals. Since the notice of appeal was lodged notice was given by the respondent that a preliminary point would be taken at the hearing of the appeal that no appeal lies against the order granted by CLAASSEN, J. . . because of the terms of sec. 150 of the Insolvency Act, and with particular reference to the amendment of that section which was introduced by Act 16 of 1943 which added a new sub-sec. (5).

This Court has no doubt that the point is well taken, and the appeal is consequently struck off the roll. [6]

[7] *Bhamjee* was followed by *Lawclaims*, in which the full court observed:

‘While it is true that s 150 (5) has been interpreted as laying down that no right of appeal exists against an order refusing such an application. . . there seems to be a clear distinction between a decision on the merits of the case (eg whether an act of insolvency has been established or whether sequestration would be to the benefit of creditors) and a decision based on the question whether the Court has jurisdiction to hear the case at all. In the former case there can be no doubt that the decision to refuse an order of liquidation would not be appealable as the order was clearly made in terms of the Act.’[7]

[8] In Lawclaims, the appellant had applied unsuccessfully for an order placing the respondent under provisional liquidation. In the alternative, it applied for its sequestration, which was also refused. The court of first instance (Thirion J) had dismissed both applications because it had come to the conclusion that it did not have jurisdiction to either wind-up or liquidate the respondent. On appeal it was contended that the decision was not appealable. It is in this context, that the dictum must be viewed.

[9] Later, the full court added:

‘However, whether Thirion J’s decision is appealable or not is, to a large extent, academic in the present case since the appellant, with the consent of the intervening creditor, has filed a fresh application for the winding-up or alternatively sequestration of Rea Shipping and at the request of the parties this Court has undertaken, if need be, to consider this fresh application because the case involves enormous sums of money and difficult questions of jurisdiction which require speedy solution.’[8]

[10] Bhamjee and Lawclaims culminated in Gottschalk, where Van Reenen J recorded:

‘When the matter was called Advocate D Williams, who appeared for the respondent, in limine, and relying on the provisions of ss (1) read with ss (5) of s 150 of the Insolvency Act 24 of 1936 (hereinafter referred to as “the Act”), contended that the dismissal of an application for a provisional order of sequestration is not appealable. As authority for that proposition he relied on a Full bench decision of the Transvaal Provincial Division, namely Bhamjee Ltd v Van Harte 1959

(4) SA 174, as well as the views of textbook writers on the law of insolvency, namely Mars The Law of Insolvency in South Africa 8th ed by Elmarie de la Rey at 126; Catherine Smith The Law of Insolvency 3rd ed at 312; and Philip M Meskin Insolvency Law at 2 – 47 para 2.2.’[9]

[11] After setting out ‘the historical matrix against which s 150 of the Act has to be viewed’, the learned judge then observed at 565F in Gottschalk:

‘Section 150 does not expressly provide for a right of appeal against an order dismissing an application for a provisional order of sequestration. Accordingly, such an order would be appealable only if it is not encompassed by the provisions of ss 150(5) of the Act. . .’

[12] Van Reenen J later added:

‘As the dismissal of the application, which forms the subject-matter of this application, was a decision given upon relief claimed in an application on notice of motion, there can be little doubt that it is an order, within the meaning thereof in s 150(5) of the Act. . .’[10]

[13] On this survey, the proposition, so it would seem, can be traced back to Bhamjee. None of the textbook writers thereafter added anything to the point. On the authority of Bhamjee, each did no more than merely assert that an order refusing a provisional application of sequestration is not appealable. In a

fashion, the unreasoned conclusion reached in Bhamjee, which was uncritically adopted thereafter by the various textbook writers, then took root. This, against the background that the question had already been settled by Centlivres CJ in *Ex parte Crous*, prior to the 1943 amendment. Bhamjee seems to have approached the enquiry on the footing that the amendment, which had the effect of negating the right of appeal, was not capable of more than one meaning. If, however, the language of the provision is to be regarded as uncertain regard had to be had to certain interpretive aids, such as, amongst others, that in cases of doubt the most beneficial interpretation is to be preferred[11] or that the legislature does not intend to alter the existing law more than necessary.[12] The purpose, particularly of the latter, being to enhance certainty.[13]

[14] Gottschalk has suggested that ‘the insertion of s 150(5) . . . probably was as a result of [the *Ex parte Crous*] decision’.[14] Even on the acceptance of that hypothesis, it is unclear why the legislature would have chosen to negative the right of appeal or put a red line through what was said in *Ex parte Crous*. As importantly, why it would have elected to do so in the manner chosen. It is so that ‘section 150 does not expressly provide for a right of appeal’.[15] Nor, does it expressly exclude it. That notwithstanding, Gottschalk seems to have inferred from the historical matrix and the terms of the amendment that there was ‘a clear legislative intent to limit, rather than extend, appeals’.[16] Whether such an inference was indeed a necessary one in the circumstances, and not merely a possible one, may require further examination.[17]

[15] One can hardly quarrel with the observation in Gottschalk that ‘the dismissal of the application . . . [is] a decision given upon relief claimed in an application on notice of motion’. However, it does not necessarily follow therefrom that ‘there can be little doubt that it is an order within the meaning thereof in s 150(5)’. It is important to distinguish the nature of relief sought (in other words the nature of the application) from the relief actually granted. An applicant undoubtedly sets out to make out a case for relief in terms of the Act. If successful, the Act would thereafter find application. If unsuccessful, it plainly would not. In dismissing the application, a court surely signifies, not just that the applicant is not entitled to any relief in terms of the Act, but also that the attempt to invoke the Act has failed. Consequently, in dismissing the application a court is effectively telling an applicant that its attempt to bring themselves within the purview of the Act has not been successful. And, what is more, on account of the applicant’s failure to make out a proper case in terms

of the Act, its provisions will no longer apply to or regulate the conduct of any further proceedings, including any appeal.

- [16] There appear to be several additional considerations that detract from the tenability of the conclusion reached in Bhamjee and the cases that followed it. First, the conclusion reached in those matters is inconsistent with the principle that the dismissal of an application, whether for final or interim relief, is in general appealable. In that regard, the order here has all three of the attributes alluded to in Zweni.[18] Even, if it did not, it has come to be accepted that it 'would nevertheless qualify as an appealable decision if it had a final and definitive effect on the proceedings or if the interests of justice required it to be regarded as an appealable decision'.[19] No reason appears to suggest itself as to why the legislature would have singled this order out as the exception to this general rule.
- [17] Second, the dismissal of an application for a provisional order of liquidation is appealable. [20] In both sequestration and liquidation proceedings, the legal machinery which comes into operation is designed to ensure that whatever assets the debtor has are liquidated and distributed among all the creditors in accordance with a fair order of preference. Once a provisional order is granted, in either instance, a concursus creditorum is established. As it was put in *Walker v Syfret NO*: '[t]he sequestration order crystallises the insolvent's position; the hand of the law is laid upon the estate, and at once the rights of the general body of creditors have to be taken into consideration'.[21] It is therefore difficult to appreciate why the dismissal of an application for a provisional order of liquidation would be appealable, but not its counterpart, the order, the subject of this appeal.[22]
- [18] Third, s 150(1) provides that 'an order setting aside an order of provisional sequestration' is appealable. It is difficult to reconcile the express recognition of a right of appeal in that instance with the denial of an appeal in this. Both stand on the same footing. Consequently, there can be no rational basis for the distinction between the two. As a matter of principle, an interim order, particularly one that is made *ex parte*, is by its nature provisional – it is 'conditional upon confirmation by the same court (albeit not the same Judge) in the same proceedings after having heard the other side',[23] which is why a litigant who secures such an order is not better positioned when the order is reconsidered on the return day.[24] Why then would an applicant, whose provisional order has been set aside, enjoy a right of appeal, but not one whose application for a provisional order has been dismissed? The answer may well lie in the fact that whilst a provisional sequestration order is one made by the court in terms of the Act, an order dismissing an application for a provisional order, as we have endeavoured to show, is not such an order. No warrant seems to otherwise exist for the differential treatment.
- [19] In other words, in recognition of the fact that the grant of a provisional sequestration order (unlike the dismissal of an

application for a provisional sequestration order) is one that ‘is made by the Court in terms of [the] Act’ within the meaning thereof in s 150(5), it was necessary for the legislature to expressly provide for a right of appeal in respect of such an order. If it is accepted that an order dismissing an application for a provisional order of sequestration is not one encompassed by the provisions of s 150(5) of the Act then, it must follow, that it was not necessary for the legislature to have expressly provided for a right of appeal against that order.

[20] To sum up: first, the provision is capable of more than one meaning; and, second, the denial of the right of appeal is not a necessary inference from the terms of the amendment, particularly when regard is had to the relevant interpretive aids already alluded to. It would thus seem that the only sensible and businesslike construction to be placed on the provision is that an order dismissing an application for a provisional sequestration order is not ‘an order made by a Court’ as contemplated by s 150(5) of the Act. To hold otherwise would give rise to the various absurd anomalies alluded to. Moreover, sight cannot be lost of the fact that consideration must also be given to whether the provision can be read in a manner that is consistent with the Constitution. On the construction favoured here, unlike in *Bhamjee*, *Lawclaims* and *Gottschalk*, there would be no denial or curtailment of a litigant’s right of appeal. Whilst it is open to an applicant to file a fresh application, that does not avail the present appellant, who can place nothing new before the court. This means that the final word has been spoken on the application. In the circumstances, the denial of a right of appeal may well mean that an obviously wrong judgment on the merits would not be open to correction. That would hardly be in the interests of justice and likely not be countenanced by the Constitution, leaving as it does, a litigant in the position of the present appellant remediless.

[21] This opens the door to a consideration of the merits of the appeal. On 16 September 2016, Liberty obtained judgment in the amount of R 883 024.43, plus interest and costs on the attorney and client scale against Mr Moosa. The claim was based on a suretyship executed by him in favour of Liberty for the liabilities of a close corporation, Shaazura Investments CC (Shaazura), which had been placed in voluntary liquidation on 13 March 2013. When Liberty failed to obtain satisfaction of the debt, it initiated an application in the high court in terms of rule 46A of the Uniform Rules of Court to have the two immovable properties that were registered in his name declared executable. Mr Moosa opposed the application and whilst it was pending, he caused ownership of the two properties to pass to the Mubaraak Family Trust (the trust). Each transfer was ‘black-booked’ – a conveyancing term - meaning that the deeds registry was requested to expedite the transfer and registration of ownership. Consequently, transfer and registration of ownership in each instance occurred one week after lodgement of the prescribed documents with the deeds registry.

[22] Mr Moosa was the founder of the trust, which was created on 8 September 2011. The three original trustees were Mr Moosa, Mr Mohammed Shuabe Moosa and a representative of a trust company, Iprotect Trustees (Pty) Ltd. Mr Moosa’s mother was subsequently appointed a trustee and Mr Mohammed Shuabe Moosa ceased at some stage to be a trustee. The trust is a

discretionary trust of which Mr Moosa and his family are the beneficiaries. According to Mr Moosa, the trust, 'owns many properties, mainly commercial', and '[i]t has available to it the knowledge, skills, contractors and workers to renovate properties cost effectively'.

[23] Mr Moosa is also a director of three property-owning companies – Sultex Holdings (Pty) Ltd (Sultex), Mstu Investments (Pty) Ltd (Mstu) and Mazzri Investments (Pty) Ltd (Mazzri). Mstu owns an immovable property in Pietermaritzburg, which it purchased from the trust for R5,5 million. Sultex purchased two immovable properties in Pinetown for R35 million. Mazzri, of which Mr Moosa is the sole director, is the owner of four immovable properties; two of which, held under one deed of transfer, were purchased from the trust for an amount of R2,7 million and the other two were purchased for R4 million and R3 million apiece. Mr Moosa admitted that he is a director of Sultex, Mstu, and Mazzri, but stated that he is not a shareholder of any one of them.

[24] It is not necessary to examine the evidence any further. Mr Moosa's answering affidavit raises more questions than answers. He was obliged to be candid with the court and deal pertinently with the facts, particularly those that fall within his peculiar knowledge. It was also incumbent on him to annex copies of relevant documentary evidence, to enable the court to ascertain whether his version survives scrutiny. And, to put up confirmatory affidavits from persons, including his mother, to whom he was allegedly indebted.

[25] What is important for present purposes is that he admitted that he is indebted to Liberty in the amount of R1 676 048.86. He described himself in his answering affidavit as being both 'factually' and 'hopelessly insolvent'. He added:

'In fact, my liabilities exceed my assets to such an extent that there would be no benefit for creditors if my estate is sequestrated as will be demonstrated below.'

Mr Moosa resists the application, because, so he contends, if a provisional sequestration order were to issue, there would be no advantage to creditors.

[26] Liberty argues that all indications are that Mr Moosa 'is indeed the driving force and directing mind of the trust' and that what he has effectively achieved is to put the properties beyond the reach of his creditors. Mr Moosa proffered no plausible explanation as to why he surreptitiously caused the passing of ownership of the two properties. That is something in regard to which an investigation and inquiry may yield a benefit to his creditors if it were found that the sale and transfer of those properties to the trust were improper dispositions as contemplated in ss 29, 30 and 31 of the Act. So too, investigations into the shareholding of Sultex, Mstu and Mazzri, all of whom own immovable properties of substantial value.

[27] Advantage to creditors may lie in the prospect of finding assets falling into the insolvent estate, which may have been concealed or improperly disposed of. It will be sufficient if the creditor, on an overall view on the papers, can show, for example, that there are reasonable grounds for coming to the conclusion that upon investigation and inquiry a trustee may be able to unearth assets that might then be attached, sold and the proceeds disposed of for

distribution amongst creditors.[25] The test to be applied in such a case, as was formulated in *Meskin & Co v Friedman*,^[26] is that:

‘... the facts put before the Court must satisfy it that there is a reasonable prospect – not necessarily a likelihood, but a prospect which is not too remote – that some pecuniary benefit will result to creditors. It is not necessary to prove that the insolvent has any assets.’^[27]

[28] The high court was evidently far too receptive to Mr Moosa’s case. A proper conspectus of the evidence ought to have led it to the conclusion that a provisional sequestration was, in the circumstances, not just appropriate, but indeed necessary. In the result, Liberty’s application should have succeeded before the high court.

[29] It remains to add that in anticipation of it failing on the appealability point, Liberty brought applications before this court for the joinder of the Minister of Justice and Correctional Services, as an incident to an application to challenge the constitutionality of s 150(5) of the Act on appeal. Those applications were opposed by Mr Moosa. As it transpired, they turned out to be unnecessary. Liberty did so out of an abundance of caution and, in the light of the various authorities against them on the point, as well as the stance adopted by Mr Moosa both before this court and the one below, they can hardly be faulted in that regard. In the circumstances it seems fitting that there should be no order as to costs in respect of those applications.

[30] In the result, the following order is made:

V M Ponnann

Judge of Appeal

P A Meyer

Appearances

For the applicant: A Gabriel SC (with G E Ender) Instructed by: Gerings Attorneys, Johannesburg
Hendre Conradie Inc, Bloemfontein For the respondent: M du Plessis SC (with M E van Jaarsveld)
Instructed by: Carlos Miranda Attorneys, Pietermaritzburg Matsepes Inc, Bloemfontein

[1] *Body Corporate of Marine Sands v Extra Dimensions 121 (Pty) Ltd* [2019] ZASCA 161 para 1.

[2] *Gottschalk v Gough* [1996] 4 All SA 614 (C); 1997 (4) SA 562 (C) (Gottschalk).

[3] *Lawclaims (Pty) Ltd v Rea Shipping Co SA: Schiffskommerz Aussenhandelsbetrieb der VVB Schiffbau Intervening* [1979] 2 ALL SA 389 (N); 1979 (4) SA 745 (Lawclaims).

[4] *Bhamjee Ltd v Van Harte* [1959] 4 All SA 106 (T); 1959

(4) SA 174 (Bhamjee).

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- [5] H Edward Mars: *The Law of Insolvency in South Africa* 6 ed (1968) at 130; E de la Rey Mars: *The Law of Insolvency in South Africa* 8 ed (1988) at 126; C Smith *The Law of Insolvency* 3 ed (1973) at 312 and P M Meskin and J A Kunst *Insolvency Law* (1994) at 2-47 para 2.2.
- [6] Bhamjee fn 4 above at 174F-G.
- [7] Lawclaims fn 3 above at 749E-F.
- [8] Ibid at 750E-F.
- [9] Gottschalk fn 2 above at 563F-G.
- [10] Ibid at 567F.
- [11] *Arenstein v Secretary for Justice* 1970
- (4) SA 273 at 281A-D. *Cornelissen v Universal Caravan Sales (Pty) Ltd* 1971
- (3) SA 158 at 175C.
- [12] In the words of Wessels J in *Casserley v Stubbs* 1916 TPD 310 at 312: ‘It is a well-known canon of construction that we cannot infer that a statute intends to alter the common law. The statute must either explicitly say that it is the intention of the legislature to alter the common law, or the inference from the Ordinance must be such that we can come to no other conclusion than that the legislature did have such an intention.’
- [13] *Bestuursliggaam van Gene Louw Laerskool v J D Roodtman* [2000] ZAWCHC 2.
- [14] Gottschalk fn 2 above at 564G.
- [15] Ibid at 565 E-F.
- [16] Ibid.
- [17] As it was put in *Kent NO v SA Railways and Another* 1946 AD 398 at 405: ‘the inference must be a necessary one not merely a possible one’.
- [18] *Zweni v Minister of Law and Order* 1993
- (1) SA 523 (A) at 532I-533A: ‘A “judgment or order” is a decision which, as a general principle, has three attributes, first, the decision must be final in effect and not susceptible of alteration by the Court of first instance; second, it must be definitive of the rights of the parties; and, third, it must have the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings.’
- [18] *Zweni v Minister of Law and Order* 1993
- (1) SA 523 (A) at 532I-533A:

‘A “judgment or order” is a decision which, as a general principle, has three attributes, first, the decision must be final in effect and not susceptible of alteration by the Court of first instance; second, it must be definitive of the rights of the parties; and, third, it must have the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings.’

[19] DRDGOLD Limited and Another v Nkala and Others [2023] ZASCA 9 para 23.

[20] Kalil v Decotex (Pty) Ltd and Another [1987] ZASCA 156; [1988] 2 All SA 159(A); 1988 (1) SA 943 (A) at 964B-D.

[21] Walker v Syfret NO 1911 AD 141.

[22] This inconsistency was acknowledged in Gottschalk at 568E-F. There, the learned judge correctly observed: ‘No reason is apparent to me for such an inconsistency between sequestration and winding-up proceedings.’

[22] This inconsistency was acknowledged in Gottschalk at 568E-F. There, the learned judge correctly observed:

‘No reason is apparent to me for such an inconsistency between sequestration and winding-up proceedings.’

[23] MV Snow Delta: Serva Ship Ltd v Discount Tonnage Ltd 2000

(4) SA 746 (SCA) para 6.

[24] Mulaudzi v Old Mutual Life Insurance Company (South Africa) Limited and Others, National Director of Public Prosecutions and Another v Mulaudzi [2017] ZASCA 88; [2017] 3 All SA 520 (SCA); 2017 (6) SA 90 (SCA) para 71.

[25] Dunlop Tyres (Pty) Ltd v Brewitt [1999] 2 All SA 328 (W); 1999 (2) SA 580 (WLD) at 582B-E and 583B-H.

[26] Meskin & Co v Friedman [1948] 2 All SA 416 (W); 1948 (2) SA 555 (W) at 559 (Meskin).

[27] The test set out in Meskin was approved by this Court in Commissioner, South African Revenue Services v Hawker Air Services (Pty) Ltd; Commissioner, South African Revenue Services v Hawker Aviation Partnership and Others [2006] ZASCA 51; [2006] 2 All SA 565 (SCA); 2006 (4) SA 292 (SCA) para 29 and by the Constitutional Court in Stratford and Others v Investec Bank Ltd and Others [2014] ZACC 38; 2015 (3) BCLR 358 (CC); 2015 (3) SA 1 (CC); (2015) 36 ILJ 583 (CC) para 43.

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