

SOUTH AFRICA / JUDGMENT

Van Jaarsveld N.O. v Q-Civils (Pty) Ltd and Another (Fortune and Others Intervening) (675/2017) [2017] ZAFSHC 74 (11 May 2017)

[2017] ZAFSHC 74

COURT

Free State High Court, Bloemfontein

BEFORE

Snellenburg, AJ

CASE / FILE NUMBER

675/2017

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IN THE HIGH COURT OF SOUTH AFRICA,

FREE STATE DIVISION, BLOEMFONTEIN

Case number: 675/2017

In the matter between:

DANIËL THEODORUS VAN JAARSVELD N.O. Applicant

and

Q-CIVILS (PTY) LTD

(IN BUSINESS RESCUE)

[Registration number: 2006/005875/07] First

Respondent

THE COMMISSIONER OF THE COMPANIES

AND INTELLECTUAL PROPERTY COMMISSION Second

Respondent

OMAR FORTUNE First

Intervening Party

CPMS CIVIL ROAD REHABILITATION

(PTY) LTD Second

Intervening Party

O & R FORTUNE FAMILY TRUST Third

Intervening Party

JUDGMENT BY: SNELLENBURG, AJ

HEARD ON: 11 MAY 2017

DELIVERED ON: 25 MAY 2017

- [1] This is an application for leave to appeal by the first respondent and intervening parties against my order dismissing their application for postponement.
- [2] On 5 May 2017 I dismissed the application by the first respondent and intervening parties for the postponement of the main application
- pending an appeal which the aforesaid parties intend to pursue against the order granted by my sister, Mbhele, J. In short the Court upheld a point in limine to the effect that the sole director of the company under business rescue requires the leave of the business rescue practitioner to act on behalf of the company (under business rescue) and in its stead. The Court held that the sole director did not have such authority. The effect of her finding is that the sole director could not instruct attorneys to act on behalf of the company (under business rescue) to oppose the application and to act on behalf of the company in this litigation. As for my judgment the reasons for my decision are set out in my written judgment.
- [3] The first respondent did not serve its application for leave to appeal within the prescribed time period with the result that it needs to apply for condonation. Currently, the first respondent therefore does not have a right to apply for leave to appeal against the order of Mbhele, J. That right will only be revived if condonation is granted for the late service of the application for leave to appeal.
- [4] The grounds of appeal are contained in the notice of application for leave to appeal and are framed to be read in conjunction and in the alternative to one another. The first respondent and intervening parties also gave notice in terms of Rule 16A. As matter of convenience the parties are referred to in this judgment as they were referred to in my judgment which forms the subject matter of this application. I will also, where appropriate, refer to the first respondent and intervening parties as ‘the applicants for leave to appeal’.
- [5] Counsel for the applicant and counsel for the first respondent and intervening parties are ad idem that the dismissal of the application for postponement has the effect of a final decision against which an appeal could lie if leave be granted. This is undoubtedly correct.
- [6] Section 17(1)(a)(ii) of Act 10 of 2013 provides that leave to appeal may be given if I am of the opinion that the appeal would have a reasonable prospect of success. The test involves that the application for leave to appeal must not be approached as if it is an impertinent challenge to the Judge concerned to justify his/her decisions. The Court is to the contrary

required to reflect dispassionately upon its decision and to decide whether reasonable prospects exist that a Higher Court may disagree from the finding of fact or law. This test postulates a dispassionate decision, based on facts and the law that the Court of Appeal could not reasonably arrive at a conclusion different to that of a Trial Court.[1] This also calls for an approach on the footing of intellectual humility and integrity, neither over-zealously endorsing the ineluctable

correctness of the decision that has been reached, nor over-anxiously referring decisions that are indubitably correct to an appellate

Court.[2]

- [7] I reserved judgment after hearing arguments in order to apply the test dispassionately. In order to properly assess the matter I have taken care, whilst keeping the grounds of appeal in consideration, to again consider the papers in the main application in conjunction with the submissions that were made both in support of and in opposition to the application for postponement.
- [8] As touched upon above the failure to serve an application for leave to appeal within the prescribed time results in the lapsing of the right to apply for leave to appeal. Only on granting of condonation for the late serving of the application for leave to appeal is the right to apply for leave to appeal revived.[3] It follows that the operation of the court order that my sister Mbhele, J made has not been suspended. It is of full legal force and effect must be given to it.
- [9] The result is that the legal representatives purporting to act for the first respondent would not have authority so to act on its behalf. That entails that they could also not make the application for postponement of the main application on behalf of the first respondent without the business rescue practitioner's authority. This is the natural consequence of the existing court

order.

- [10] The intervening parties on the other hand always had the required standing to apply for a postponement. Whether they were entitled to the postponement is a different question.
- [11] The majority of the grounds on which leave to appeal is sought imply, as was also submitted during arguments on behalf of the applicants for leave to appeal, that I am not bound by Mbhele, J's order and that I have the option not to follow the same if I was of the opinion that it was clearly wrong. I do not agree with the proposition. In the matter of Moraitis Investments (Pty) Ltd v Montic Dairy (Pty) Ltd (799/2016)
- [2017] ZASCA 54 (18 May 2017) the Supreme Court of Appeal left no doubt regarding the force and effect of a court order.

“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. It is res judicata as between the parties in regard to the matters covered thereby.[4] 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.[5]

So much the more would I be bound by the order where I hear an application for postponement in the same matter where the order has

been made which is final in its effect and which is not yet the subject of an application for leave to appeal. Any rights of the first respondent which may be limited, is limited by an existing court order.

[12] There is to my mind no reasonable prospect of success that a Court of appeal will come to a different conclusion on the law or the facts in this regard.

[13] The question that needs to be considered ultimately is whether any reasonable prospects exists that a Court of appeal may conclude that by dismissing the application for postponement, I failed to exercise the discretion judicially, or had been influenced by wrong principles, or committed a misdirection on the facts or that I reached a decision which in the result could not reasonably have been made by a court properly directing itself to all relevant facts and principles.[6]

[14] The applicants for leave contend that my decision to refuse the postponement infringes on the first respondent’s constitutional

rights to a fair hearing, to access to court, to have the dispute resolved by application of law before the court and the right to enforcement of an effective remedy. The gist of the grounds of appeal, as framed, fails to take into consideration the fact that the court had already pronounced on the interpretation of the applicable provisions of the Companies Act, 2008. I of course refer to Mbhele, J’s judgment and order. As stated, that order is extant.

[15] I must ultimately assess whether a Court of appeal could come to a conclusion that my decision was vitiated by error on any one of the grounds listed in paragraph 13 above. I have carefully re-examined the matter as stated.

[16] The question reduced to its most basic form must be whether there are reasonable prospects that the Court of appeal will come to the conclusion that I erred in not granting the postponement in order to allow the first respondent the opportunity to pursue the condonation application, application for leave to appeal and, if successful, the appeal to challenge the finding that a company under business rescue cannot be represented without leave of the business rescue practitioner in an application for the termination of its business rescue and liquidation as well as its counter application in light of the fact that the proceedings will proceed without the first respondent having representation.

- [17] The following main contentions were also made in support of the application in addition to the grounds for leave to appeal as contained in the application for leave to appeal: The effect of the dismissal of the application for postponement is that the matter will argued without legal representatives arguing the first respondent's case on its behalf; nobody is entitled to argue another's cause on his behalf; by allowing the main application to be argued in absence of the first respondent I also limit its right to access to court and a fair hearing whilst the limitation is not justifiable; I failed to apply s36 of the Constitution; I found that the first respondent does not have locus standi; the first respondent has reasonable prospects of success with the intended appeal and I erred in not according enough weight to that issue which should have been the determining factor in light of the constitutional infringements; the appeal will become academic and a Court of appeal may refuse to hear the appeal if leave be granted but the main application has been adjudicated upon; I over emphasised the interests of affected parties and erred in finding that the interests of justice dictated that the application must be heard regardless of the exclusion of representation on behalf of the first respondent; the application for postponement was not an ordinary application and I did not have an unfettered discretion to refuse the application as the matter raises important and novel questions; I erred in concluding that the interests of affected parties were not addressed as the matter was canvassed in the first respondent's answering affidavit where the prospects that the business can still be rescued are dealt with.
- [18] To my mind there are no reasonable prospects that a Court of appeal will conclude that I erred in exercising my discretion or that my dismissal of the application for postponement is impeachable as result of a vitiating error.

18.1 The intervening parties intervened in the event that the special plea was upheld so that the application can be opposed. They incorporated the 'first respondent's answering affidavit' in their applications to resist the relief. The intervening parties now argue in this application for leave to appeal that I erred in finding that they rely on the same grounds as advanced on behalf of the first respondent. But that is exactly what the intervening parties have done by incorporating the answering affidavit filed on behalf of the first respondent into their intervention applications which also serve as affidavits to resist the relief in the main application.

18.2 Mr Fortune is the sole director and represents the shareholder. He is also on his version an affected party as creditor of the first respondent. He deposed to all the affidavits that resist the application and incorporated his evidence in the answering affidavit to the main application into his personal intervention application. He claims the same relief as in the counter application filed on behalf of the first respondent.

18.3 The finding that the first respondent cannot be represented by the present attorney and counsel does not change the ambit of the evidence that will serve before the court. Mr Fortune remains the primary witness in opposition to the relief and his evidence is before the court by agreement between the parties. There is no witness better able to testify as to why the main application should fail and the counter application should succeed. In this instance the distinction appears to be more apparent than real.

18.4 The existing court order does have the effect that the director cannot without authorisation appoint legal representatives to act for the respondent to oppose the main application. I am bound to that decision. The limitation needs to be weighed against the other prevailing considerations. I did consider the constitutional rights of the first respondent and the limitation thereof.

18.5 The reality remains that all the evidence that could conceivably have been led in favour of the first respondent has been put before the court by the sole director of the first respondent. He would have testified on behalf of the first respondent, he now does so in his capacity as director of the company, representative of the shareholder, creditor, member of an associated company and he relies on the same evidence he gave on behalf of the company in the first place. In what manner the scope of the evidence is argued to be subject to change has not been identified.

18.6 The underlying factual matrix always remain relevant. The intervening parties, with reliance on the answering affidavit, paints a dire picture of the ineptness of the current business practitioner. Serious allegations are levelled against him to such extent that his replacement by a new business rescue practitioner is advocated and in fact sought. These allegations on their own indicate that the interests of the affected persons are also material and seriously at stake. It was submitted that business rescue may also yield a better dividend than the liquidation would. It is inconceivable that this can be achieved if the present business rescue practitioner remains in office on the version presently before court. The current business rescue practitioner has in fact been put on terms regarding possible claims for damages by the director. There is also mention of a joint-venture that may be concluded to assist the first respondent that the current business rescue practitioner is not interested in following up on. It could never be argued to be in the intervening parties interests, or that of the first respondent itself, or the affected parties' that the status quo remain for an undetermined period of time in light of these allegations and considerations.

18.7 On the other hand the business rescue practitioner paints a very bleak picture of a factually and commercially insolvent company. He states that contracts have been cancelled or will expire in the near future; there is no short term insurance in place; the work force has been terminated; the value of contracts that the director relies on is over-estimated and creates a misperception regarding the possible income and the business is insolvent. There is no post-business rescue finance available. The possible 'joint-venture' is not a realistic possibility according to him. If these facts are found to be correct the creditors' interests are just as much at stake and in jeopardy. How long should the creditors be without recourse if this is found to be the correct factual situation.

18.8 The matter of prejudice to affected parties, other than the intervening parties, as should be apparent, is material and was not adequately addressed by applicants for the postponement. Those interests must also be weighed against the limitations complained of by the first respondent. The constitutional infringements were carefully considered and weighed against the other relevant interests.

18.9 It cannot be argued in the present circumstances that the Court had no discretion to refuse the application for postponement. I do not agree with the applicants for leave to appeal's contention that this is a matter where the Court would have no choice than to grant a postponement.

18.10 The Supreme Court of Appeal and Courts of appeal do have the discretion to pronounce on issues which are of sufficient importance even when the main lis has fallen away.

[19] I am not satisfied that reasonable prospects exists that the Court of Appeal could reasonably arrive at a conclusion that the discretion was not exercised judicially or that there exists some other vitiating error.

[20] Accordingly, IT IS ORDERED:

1. The application for leave to appeal is dismissed with costs.

N. SNELLENBURG, AJ

On behalf of the First Respondent

and 1st, 2nd and 3rd Intervening party

(Applicants for leave to appeal): Adv. C Ploos van Amstel SC

Assisted by:

Adv. P du P Greyling

Instructed by:

M Van Zyl, Marius Van Zyl Inc.

Bloemfontein

On behalf of the Applicant

(Respondent re application for leave): Adv. P Zietsman SC

Assisted by:

Adv. R van der Merwe

Instructed by:

BM Jones, Honey Attorneys

- [1] S v Mabena and Another 2007(1) SACR 482 (SCA).
- [2] Shinga v The State and Another (Society of Advocates (Pietermaritzburg Bar) Intervening as Amicus Curiae); S v O'Connell and Others 2007
- (2) SACR 28 (CC) para 53.
- [3] Panayiotou v Shoprite Checkers (Pty) Ltd AND Others 2016 (3) SA 110 (GJ).
- [4] Eke v Parsons 2016 (3) SA 37 (CC) paras 29-31; Provincial Government North West and Another v Tsoga Developers CC and Others
- [2016] ZACC 9; 2016 (5) BCLR 687 (CC) para 47.
- [5] Department of Transport and Others v Tasima (Pty) Ltd
- [2016] ZACC 39; 2017 (2) SA 622 (CC) paras 177-183. There is a narrow exception where a court makes an order that is on its face beyond its powers, as with the order to appoint a specific individual as a provisional liquidator that was in issue in Master of the High Court (North Gauteng High Court, Pretoria) v Motala NO and Others [2011] ZASCA 238; 2012 (3) SA 325 (SCA). That order was invalid as the power to appoint a provisional liquidator was exclusively vested in the Master and accordingly the Master could not be held to be in contempt by declining to make the appointment. See Tasima para 197 and Provincial Government North West v Tsoga Developers CC and Others
- [2016] ZACC 9; 2016 (5) BCLR 687 (CC) para 50.
- [6] National Coalition for Gay & Lesbian Equality v Minister of Home Affairs 2000 (2) SA 1 (CC) par 11.

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