

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 2010/22522

DATE:19/09/2011

REPORTABLE

In the matter between:

PELLOW N.O. ALLAN DAVID

1st Applicant

KOKA N.O. JERRY SEKETE

2nd Applicant

INVESTEC BANK LTD

3rd Applicant

and

THE MASTER OF THE HIGH COURT

1st Respondent

GENERAL BELTINGS (PTY) LIMITED

2nd Respondent

HARRY KAPLAN N.O.

3rd Respondent

LEBOGANG MICHAEL MOLOTO N.O.

4th Respondent

GAVIN CECIL GAINSFORD N.O.

5th Respondent

JUDGMENT- LEAVE TO EXECUTE

SPILG, J:

THE APPLICATION

1. The three applicants, being respectively the two liquidators of African Heritage Investments (Pty) Ltd (*AHI*) whom the Master (in the person of Assistant Master Adv N Netshitahame) had removed from office and *AHI*'s major creditor (Investec), seek an order under Uniform Rule 49(11) for leave to execute on the order I made on 18 August 2011 reviewing and setting aside that decision. I had also ordered the reinstatement of the liquidators who together with the three liquidators whom the Master has subsequently appointed are to continue as liquidators of *AHI*. It should be pointed out that in the main judgment I mentioned that Investec had withdrawn as a party. This was incorrect, only the attorneys had withdrawn. Nothing however turns on this.

2. It bears repeating that neither the Master nor the subsequently appointed liquidators opposed the review application, let alone that part of the order seeking reinstatement. Similarly it bears mentioning that the effect of the court order made on 18 August setting aside the Master's decision to remove the original liquidators is to place the control and administration of the affairs of *AHI* in the hands of five liquidators. The decision accordingly is one regarding status as it determines the *locus standi* of the liquidators and their authority to act. The effect of the application for leave to appeal which was brought on 30 August 2011 is to restore the *status quo ante*. Accordingly any decision regarding the advisability or otherwise of allowing execution pending any leave to appeal or appeal must take into account problematic questions that may arise if the three liquidators wish to take decisions without the concurrence of the two who have been reinstated before the appeal is finalised. By this I contemplate the exhaustion of all appeal procedures which may take a considerable time with the potential of adversely affecting the expeditious finalisation of the liquidation process and the ability to recover assets some of

which have allegedly been demonstrated to have been dissipated into the hands of third parties.

3. The nature of the matter and the patent lack of merit in the defences raised made it desirable to give a decision as soon as possible even though it was not possible to provide reasons at the same time due to the uninterrupted allocation of cases at the time. It was necessary to take care in formulating certain aspects of the judgment, not because of the case before me - which I considered to be clear cut, but rather in order to have sufficient opportunity to consider the broader consequences of the way I intended formulating my reasons and whether they ought to be more narrowly stated. In the result it was only when the application for leave to execute was launched that the court became aware that General Beltings had brought an application for leave to appeal on 30 August 2011, which it had not previously directed be allocated a date for hearing, let alone advise that it intended appealing and therefore desired that reasons be provided urgently.
4. The application for leave to appeal was set down for hearing on 9 September 2011. Although not requested, during the hearing I decided to adjourn for one week until 16 September 2011 so that I could deliver reasons for judgment in the review application on 13 September 2011. This course was adopted so that General Beltings' counsel had an opportunity to consider them before the hearing, since success on appeal is a factor that must be taken into account in an application for leave to execute pending an appeal.
5. The reasons for setting aside the Master's decision were delivered in open court on 13 September 2011. They were noted by another counsel appointed by General Beltings. The typed version was made available later that day. On a re-reading certain grammatical errors and an error in what had not been transposed onto the typed version were revealed. These were corrected on the revised version of 14 September 2011

which would have been received by both parties no later than the following morning. The revision did not affect the substance of the reasons for finding against General Beltings and setting aside the Master's decision to remove the original liquidators.

6. While I had understood that counsel for General Beltings would amend its application for leave to appeal if so desired and argue its application first at the resumed hearing on 16 September, its counsel indicated that General Beltings had instructed that it wished to consider whether to amend its grounds of appeal over the 15 day period allowed by the Rules. No application was made to postpone the hearing of the application for leave to execute and I accordingly only heard that application on 16 September.

APPLICATION TO REINSTATE LIQUIDATORS PENDING APPEAL

7. The leading authority on the considerations that a court ought to take into account when a request is made for leave to execute pending an appeal remains *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd* 1977 (3) SA 534 (AD) at 545D-546A. Corbett JA (at the time) speaking on behalf of the court held that;
 - a. The court exercises a discretion based on what appears to be “*most consistent with real and substantial justice* “ having regard to what is “*just and equitable in all the circumstances*” ;
 - b. In giving effect to this, the court “... *would normally have regard, inter alia, to the following factors:*
 - (1) *the potentiality of irreparable harm or prejudice being sustained by the appellant on appeal ... if leave to execute were to be granted;*

- (2) *the potentiality of irreparable harm or prejudice being sustained by the respondent on appeal ... if leave to execute were to be refused;*
- (3) *the prospects of success on appeal, more particularly the question as to whether the appeal is frivolous or vexatious or has been noted not with the bona fide intention of seeking to reverse the judgment but for some indirect purpose, eg., to gain time or harass the other part; and*
- (4) *where there is the potentiality of irreparable harm or prejudice to both appellant and respondent, the balance of hardship or convenience, as the case may be.”*
(emphasis added)

8. *South Cape* was concerned with an application for leave to execute pending the appeal of a money judgment. (at 542D). The case before me has a broader dimension. It has repercussions with regard to the effectiveness of the liquidation process, the expedition with which further investigations or existing proceedings might be pursued, the risk of the process becoming moribund while General Beltings pursues its rights of appeal and any other factor that has the potential of irreparably harming or prejudicing the orderly winding up of the company in liquidation if the appellant is successful as opposed to if it is unsuccessful with its appeal. It is clear from *South Cape* that the considerations mentioned in the case do not constitute a closed list.

POTENTIAL FOR IRREPERABLE HARM OR PREJUDICE AND BALANCE OF HARDSHIP OR CONVENIENCE

9. General Beltings claims that it will be irreparably prejudiced if the original liquidators are reinstated with the three current liquidators. The basis advanced is they will look after the interests of Investec to the prejudice of General Beltings by not enquiring into the validity of

Investec's claim and by not having done their job properly in failing to reduce any alleged claim by General Beltings against AHI by the recovery of some R27.3 million in the liquidation of Cade Transport (Pty) Ltd ("*Cade*") where Pellow is one of the joint liquidators. Neither ground is founded on fact but is based on submissions. This is adequately demonstrated by counsel for AHI confirming that there is nothing in either the main application or in the present interlocutory proceedings suggesting that Investec's claim is challenged. Indeed while the applicants were removed as liquidators the attempt to call executives of Investec and senior members of Edward Nathan Sonnenberg to an enquiry were not pursued. On the contrary the Master subsequently closed the enquiry.

10. Similarly there is no factual support provided by General Beltings in regard to the allegations of not accounting for the R27.3 million recovery in Cade which is reflected in the Liquidation and Distribution account of Cade drawn in June 2010. It will be recalled that Pellow was removed as a liquidator in AHI on 20 September 2010 and there is no suggestion that he either had concealed the recovery or otherwise would not be accounting for it when AHI's Liquidation and Distribution account is drawn.
11. General Beltings also submit that the three liquidators who replaced the applicants do not provide an adequate numerical safeguard in relation to any action that the two applicants may take in the interests of Investec should my order be implemented now. The argument is that the three current liquidators were also supported by Investec and cannot be relied upon. This argument is self-defeating. If the current three liquidators are said to support Investec then it is difficult to appreciate what irreparable harm will be occasioned if the applicants are reinstated now and the appeal ultimately succeeds.

12. There is no discernible prejudice to General Beltings *qua* creditor if its appeal is successful and in the interim the applicants are reinstated as liquidators. On the contrary their conduct demonstrates that there can be no downside for General Beltings. Every successful unearthing of AHI assets increases General Beltings dividend while the cost of any fruitless enquiry is born exclusively by the major creditor. And ultimately the remaining liquidators are able to regularise anything done during the tenure of all five liquidators. Since there is no discernable prejudice to General Beltings the second leg of this part of the *South Cape* enquiry, namely that of balance of hardship or convenience, does not arise.
13. General Beltings however argues that it is the applicants who have not set out a basis for contending that they are irreparably prejudiced if they are not reinstated pending the outcome of the appeal. In my view all the parties are entitled to rely on the contents of affidavits in the main application without being obliged to repeat them chapter and verse. This is an interlocutory application which, save in exceptional circumstances, is heard by the judge who made the substantive order against which the respondent has sought leave to appeal.
14. In my view while it cannot be said that the applicants in their individual capacity will be irreparably prejudiced I am quite satisfied that the potential for irreparable harm or prejudice exists to the orderly and expeditious liquidation process if the applicants are not reinstated now and the appeal process does not result in my decision being overturned. The evidence before me in the main application indicates that substantial grounds exist for believing that AHI's assets have been wrongfully dissipated by its directors with the assistance of others. The longer it takes to finalise the investigative process or the litigation initiated under the applicants the greater the risk that, if the allegations are correct, assets will be disposed of and the liquidation process thereby irreversible prejudiced. There is a real likelihood that the

liquidation process will grind to a halt until the appeal process is finally concluded or exhausted. Conversely the applicants adequately demonstrated in the main application that they had vigorously pursued their duty to recover assets for the benefit of creditors and would have acquired information and knowledge that might yet be of assistance in the course of the litigation without incurring further unnecessary expense.

PROSPECTS OF SUCCESS ON APPEAL AND WHETHER APPEAL *BONA FIDE*

15. General Beltings continued to rely on the broad grounds set out in its application for leave to appeal. It did not raise any other grounds in argument nor seek a postponement despite accepting the basis upon which an application of this nature is to be determined.
16. In my view counsel for General Beltings remained unable during the hearing to demonstrate that there are prospects of success on appeal on the grounds raised. I do not believe that another court might come to a different conclusion on the grounds raised because the decision of the Master does not bear scrutiny if regard is had to the written representations made by the applicants and the Master's failure to have regard to them as well as his failure to afford the applicants an opportunity to respond to new facts. Moreover there remains the inexplicable failure to have regard to the ordinary practices adopted and accepted in the liquidation process.
17. The background to the removal of the applicants was set out in the main judgment. It reveals the lengths to which Mawere and Mariemuthu went in their attempt to frustrate the enquiry and the litigation directed at them or entities in which they had an interest. The question as to what possible interest General Beltings may have *qua*

creditor to remove the applicants, when enquiries they conducted led to the interdicts which preserved assets for its benefit and when section 424 proceedings have been instituted which if successful will benefit them as creditors, remains unanswered. These factors justify the grave concern that the application for leave to appeal is not *bona fide*, but brought for the indirect purpose of delay and harassment.

ORDER

18. The applicants seek a punitive order for costs. The costs will stand over and be dealt with when the application for leave to appeal is considered.
 19. I am satisfied that it is just and equitable in all the circumstances to make the following order which will obviate the necessity for the applicants to bring a new application if leave is refused and the Supreme Court of Appeal is petitioned:
 - a. Pending the outcome of the application for leave to appeal, alternatively the outcome of an application for leave to appeal to the Supreme Court of Appeal, or the finalisation of an appeal should leave be granted by the Court or by the Supreme Court of Appeal, the first and second applicants are immediately reinstated as joint liquidators of Africa Heritage Investments (Pty) Ltd (in liquidation);
 - b. The costs are reserved for determination at the hearing of the second respondent's application for leave to appeal.
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Attorneys for First and Second Applicant	: Werkmans Attorney
Counsel for First and Second Applicant	: Adv. M M Antonie Adv. A J Lapan
Attorneys for Second Respondent	: Kyle Attorneys
Counsel for Second Respondent	: Adv
Date of hearing	: 9 and 16 September 2011
Date of order	: 19 September 2011
Date of Reasons for Judgment	: 19 September 2011