



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

Case no: 83573/2018

25.02.2022

SIGNATURE

DATE

In the matter between:

ZARCO FORMWORK AND SCAFFOLDING CC

FIRST APPLICANT

CARLOS JORGE MARTINS N.O

SECOND APPLICANT

(in his capacity as duly authorised trustee of the
CJM Investment and Holdings Trust - IT 594/2009)

and

CASTLE CREST PROPERTIES 40 (PTY) LTD

(IN LIQUIDATION)

FIRST RESPONDENT

(Registration number: 2007/016413/07)

JAY PEMA N.O

SECOND RESPONDENT

(In his capacity as the previously appointed
business rescue practitioner of Castle Crest

Properties 40 (Pty) Ltd (In Liquidation)

THE MASTER OF THE HIGH COURT, PRETORIA

THIRD RESPONDENT

**THE COMMISSIONER OF THE COMPANIES AND
INTELLECTUAL PROPERTY COMMISSION**

FOURTH RESPONDENT

JOHANNES ZACHARAIS HUMAN MULLER N.O

FIFTH RESPONDENT

PULENG FELICITY BODIBE N.O

SIXTH RESPONDENT

PONCHO LERATO SERITI N.O

SEVENTH RESPONDENT

(In their capacities as the duly appointed
joint liquidators of SA Machado Construction
(Pty) Ltd (In Liquidation)

BLEND PROP 12 (PTY) LIMITED

EIGHTH RESPONDENT

THE REGISTRAR OF DEEDS, PRETORIA

NINTH RESPONDENT

ABSA BANK LIMITED

TENTH RESPONDENT

G.L.S. DE WET N.O

ELEVENTH RESPONDENT

K. TITUS N.O

TWELFTH RESPONDENT

S. TINTINGER N.O

THIRTEENTH RESPONDENT

(in their capacities as liquidators
of Mont Blanc Projects & Properties
(Pty) Ltd (In Liquidation)

SOUTH AFRICAN REVENUE SERVICES

FOURTEENTH RESPONDENT

THE EMPLOYEES OF CASTLE

CREST PROPERTIES

40 (PTY) LTD

EIGHTEENTH RESPONDENT

STANDARD BANK OF SOUTH AFRICA LTD

NINETEENTH RESPONDENT

VANS AUCTIONEERS (PTY) LIMITED

TWENTIETH RESPONDENT

TANYA DU PREEZ N.O

TWENTY-FIRST RESPONDENT

MARIA DA CONCEICAO DE FREITAS

VASCONCELOS N.O

TWENTY-SECOND RESPONDENT

MARIO ROCHA N.O

TWENTY-THIRD RESPONDENT

(In their representative capacities as

Joint trustees of the LWWS Trust, IT 3059/04)

JUDGMENT

(APPLICATION FOR LEAVE TO APPEAL)

AC BASSON, J

[1] On 1 December 2021, this court dismissed the applicants' rescission application and ordered the applicants to pay the costs on a scale as between attorney and client.

LEAVE TO APPEAL

[2] Section 17 of the Superior Courts Act 10 of 2013 governs applications for leave to appeal. This section states:

"Leave to appeal

17. (1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that—

- (a) (i) *the appeal would have a reasonable prospect of success; or*
- (ii) *there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;*
- (b) *the decision sought on appeal does not fall within the ambit of section 16(2)(a); and*
- (c) *where the decision sought to be appealed does not dispose of all the issues in the case, the appeal would lead to a just and prompt resolution of the real issues between the parties.”*

[3] The test for leave to appeal therefore is whether the prospective appellant has reasonable prospects that another court *would* come to a different conclusion on the facts or a question. The court in *Doorewaard and Another v S*¹ explains:

“[6] ...*The test to be applied is now higher than what it used to be. It is no longer whether another court may (might) come to a different decision than what the trial court arrived at. It is now whether another court, sitting as court of appeal, would come to a different decision.*

[7] *In the Notice of Application for Leave to Appeal, it is stated:*

“The application for leave to appeal is on the basis that there is a reasonable prospect of success that another court may find that the Appellants versions were reasonable possibly true and the sentences imposed are inconsistent with the facts and induce a sense of shock.”

This is not the correct approach or test to be applied. It is not may but would. That another court would find that the applicant’s (appellants’) versions were reasonably possibly true and that the sentences imposed are inconsistent with the facts and induces a sense of shock.”

[4] The application for leave to appeal is premised, *inter alia*, on the submission that:

4.1 The Court erred in not rescinding the order dated 11 December 2018;

¹ (CC33/2017) [2019] ZANWHC 25 (23 May 2019)

4.2 The Court erred in finding that the applicants do not have *locus standi* to launch the application;

4.3 The Court erred in finding that the application is moot;

4.4 The Court erred in not finding that the order was incompetent in law as no court has jurisdiction to appoint a liquidator;

4.5 The Court erred in finding that the liquidation of Mont Blanc resulted in the legal *persona* of the latter ceased to exist;

4.6 The Court erred in not finding that the liquidation of a company does not divest the company of its assets or vest them in the Master or the liquidator; and

4.7 The Court erred in not finding that the dominium of a company's property remains vested in the company. Liquidation merely deprives the directors of their powers.

[5] I do not intend dealing with each and every point raised by the applicants. I have considered the points raised by the applicants and I am not persuaded that there is a reasonable prospect that another court would come to a different conclusion. I will, however, briefly deal with some of the issues raised.

BACKGROUND

[6] I also do not intend rehashing the relevant facts. They are set out in the judgment. Suffice to restate that on 11 December 2018, the fifth to eight respondents obtained a court order to terminate the business rescue proceedings of Castle Crest and to place it in liquidation. The corporate veil of Castle Crest was also pierced in favour of the insolvent SA Machado.

[7] The applicants launched an application in terms of Rule 42(1)(a). This rule reads as follows:

“(1) The court may, in addition to any other powers it may have, mero motu or upon the application of any party affected, rescind or vary:

(a) An order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby”

[8] The applicants alleged in its papers that the order was erroneously sought and that it was granted in their absence and that they did not obtain adequate notice.

[9] This Court held on the facts that Mr Rocha and the applicants were aware of the corporate veil application as the business rescue practitioner of Castle Crest (“Mr Pema”), through his attorney of record (who is the same attorney who represented Rocha) filed an answering affidavit to the Corporate Veil Application on 10 December 2018.

[10] The corporate veil order must therefore have come to Mr Pema’s knowledge at the latest by 12 December 2018 as it is inconceivable that Mr Pema (who had a close relationship with Mr Rocha) would not have been made aware of the order.

[11] Despite knowledge, the rescission application was only filed on 29 October 2019.

LOCUS STANDI OF THE APPLICANTS

[12] This Court held that the applicants, in any event, did not have the required *locus standi* to have succeeded with the rescission application.

[13] The applicants contest this finding and persist with the argument that Zarco (the first applicant) and CJM Trust (the second applicant) had *locus standi* to bring the application based on Zarco being a creditor and based on CJM Trust’s indirect interest coupled with the exceptional circumstances of the case.

[14] There is no merit in this ground of appeal and I am not persuaded that there is a reasonable prospect that another court may find differently on this issue. The law is clear. It is for the party instituting proceedings to allege and prove its *locus standi*, and the onus of establishing this fact, rests on that party. See in this regard:

Kommissaris van Binnelandse Inkomste v Van der Heever.² The court in *Jacobs v Waks*³ explains what must be considered in deciding whether a party has the necessary *locus standi*:

“In die omstandighede van die huidige saak is dit veral die vereiste van 'n direkte belang wat op die voorgrond staan. Wat dit betref, is die beoordeling van die vraag of 'n litigant se belang by die geding kwalifiseer as 'n direkte belang, dan wel of dit te ver verwyderd is, altyd afhanklik van die besondere feite van elke afsonderlike geval, en geen vaste of algemeen geldende reëls kan neergelê word vir die beantwoording van die vraag nie”

[15] The Supreme Court of Appeal in *Four Wheel Drive Accessory Distributors CC v Rattan NO*⁴ similarly considered the requirements of *locus standi* and held that -

[7] The logical starting point is locus standi — whether in the circumstances the plaintiff had an interest in the relief claimed, which entitled it to bring the action. Generally, the requirements for locus standi are these. The plaintiff must have an adequate interest in the subject matter of the litigation, usually described as a direct interest in the relief sought; the interest must not be too remote; the interest must be actual, not abstract or academic; and it must be a current interest and not a hypothetical one. The duty to allege and prove locus standi rests on the party instituting the proceedings.

[8] The rule that only a person who has a direct interest in the relief sought can claim a remedy, is no more clearly expressed than in the judgment of Innes CJ in Dalrymple:

‘The general rule of our law is that no man can sue in respect of a wrongful act, unless it constitutes a breach of a duty owed to him by the wrongdoer, or unless it causes him some damage in law.’”

² [1999] 3 All SA 115 (A) at par 10.

³ 1992 (1) SA 521 (A) at 534 C-D.

⁴ 2019 (3) SA 451 (SCA).

[16] In the judgment I have referred to the two pillars on which the applicants contended that they have *locus standi*:

16.1 firstly, that the first applicant is a creditor for an amount of R7,658,306.39, being the amount due by Castle Crest Properties 40 (Pty) Ltd for services rendered and goods sold and delivered; and

16.2 secondly, that the second applicant, through its shareholding in Mont Blanc Properties and Projects (Pty) Ltd, in turn owns shares in Castle Crest Properties 40 (Pty) Ltd and is thus an indirect shareholder of Castle Crest Properties 40 (Pty) Ltd.

[17] In respect of the first submission, the court rejected the allegation that the first applicant is a creditor of the first respondent for services rendered and goods supplied in that the first applicant relied on three invoices, dated September 2016 to November 2016 which were fabricated. I am not persuaded that there is a reasonable prospect that another court may find differently in respect of this finding.

[18] The second pillar was also rejected, *inter alia*, on the basis that the liquidators of Mont Blanc Properties and Projects (Pty) Ltd had no objection to the relief which was granted to the fifth to seventh respondents. I am likewise not persuaded that there is a reasonable prospect that another court may find differently in respect of this finding.

MOOTNESS

[19] The applicant submitted that a “*realistic chance*” exists that another court will find that the application was not moot as was found by this Court because the creditors and members of Machado and Castle Crest Properties 40 (Pty) Ltd are distinct and separate and have rights that they could not be divested of.

[20] There is no merit in this argument: The property was offered for sale, in the open market, at public auction and was sold for more than the actual market value for the property as per the valuation and far above the forced sale value thereof. Also, the deponent to the application was already aware of the fact that the property was being sold on auction on 13 March 2019.

[21] I am not persuaded that there is a reasonable prospect that another court will find differently.

FAILURE TO SEEK CONDONATION

[22] It is common cause that the rescission application was instituted some 11 months after the corporate veil order was granted. Despite such long delay in instituting the rescission application, the applicants failed to seek condonation for the late filing of the application.

[23] This court pointed out that, although Mr Rocha had the intention since 26 February 2019 to institute the same proceedings he, however, only elected to launch the rescission application on 31 October 2019 at 15:39. In *Dreyer v Norval & Others*⁵ the Court held -

“[7] ... that it is a well-established principle that in an application for condonation the applicant has the burden of showing, as opposed to merely alleging, the good cause that is required as a jurisdictional prerequisite to the exercise of the Court's discretion. The person seeking condonation must at least furnish an explanation of the default sufficiently for the Court to understand how it came about and to assess the conduct and motives.”

[24] A person seeking condonation must, at the very least, furnish an explanation of the default sufficiently for the court to understand how it came about and to assess the conduct and motives. In determining whether or not to grant condonation for non-compliance with the rules of Court, the prospect of success which is invariably linked to the merits of the matter needs to be considered. Where a party is the author of its own problems it would be inequitable to visit the other party to the action with the prejudice and inconvenience flowing from such conduct.⁶

⁵ [2006] JDR 0831 (T).

⁶ *De Wet and Others v Western Bank Ltd*, 1979 (2) SA 1031 (A).

[25] Overriding is the question, taking into account all the circumstances, whether it is in the interests of justice to grant condonation in the circumstances as explained by the Constitutional Court in *Grootboom v National Prosecuting Authority and Another*.⁷

“[21] The failure by parties to comply with the rules of court or directions is not of recent origin. Non-compliance has bedevilled our courts at various levels for a long time. Even this court has not been spared the irritation and inconvenience flowing from a failure by parties to abide by the rules of this court.

[22] I have read the judgment by my colleague Zondo J. I agree with him that, based on Brummer and Van Wyk, the standard for considering an application for condonation is the interests of justice. However, the concept 'interests of justice' is so elastic that it is not capable of precise definition. As the two cases demonstrate, it includes: the nature of the relief sought; the extent and cause of the delay; the effect of the delay on the administration of justice and other litigants; the reasonableness of the explanation for the delay; the importance of the issue to be raised in the intended appeal; and the prospects of success. It is crucial to reiterate that both Brummer and Van Wyk emphasise that the ultimate determination of what is in the interests of justice must reflect due regard to all the relevant factors but it is not necessarily limited to those mentioned above. The particular circumstances of each case will determine which of these factors are relevant.

[23] It is now trite that condonation cannot be had for the mere asking. A party seeking condonation must make out a case entitling it to the court's indulgence. It must show sufficient cause. This requires a party to give a full explanation for the non-compliance with the rules or court's directions. Of great significance, the explanation must be reasonable enough to excuse the default.”

[26] It is not in the interests of justice to grant condonation, particularly where the default is lengthy and in the absence of a proper explanation for the delay. The

⁷ 2014 (2) SA 68 (CC).

explanation for the delay in the founding affidavit is sorely lacking in detail, incomplete and unsatisfactory and the attempt to provide an explanation in the replying affidavit is inappropriate.

[27] I am not persuaded that there is a reasonable prospect that another Court will find differently in respect of this Court's refusal of condonation.

LIQUIDATOR'S AUTHORITY TO BRING THE APPLICATION FOR THE ORDER THAT WAS GRANTED ON 11 DECEMBER 2018

[28] The applicants submitted that there is a "*realistic chance*" that another Court will find that the order was erroneously granted because the liquidators of Machado had no authority to bring the application for the order that was granted on 11 December 2018, and that is being sought to be rescinded and set aside.

[29] There is no merit in this contention. The Court in the order of 11 December 2018, specifically provided the applicants with the authority to institute legal proceedings. Also, the applicants fail to consider the resolutions accepted by the Master in terms of which the authorisation is also provided to institute legal proceedings and to employ attorneys and counsel for that purpose. (Master's reference: T0052/17)

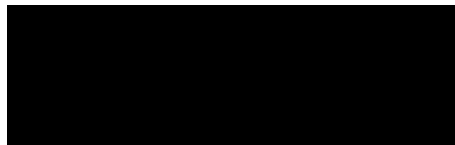
[30] There is therefore no merit in the argument that the liquidators did not have authority to institute these proceedings.

[31] In conclusion, the applicants submitted that based on several legal intricacies of this case, leave to appeal should be granted. I do not agree. The matter is not complex and there exist no basis upon which it can be said that there is a reasonable prospect that another Court may come to a different conclusion.

Order

[32] In the event, the following order is made:

The application for leave to appeal is dismissed with costs.



A.C. BASSON

JUDGE OF THE HIGH COURT

GAUTENG DIVISION OF THE HIGH COURT, PRETORIA

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 25 February 2022.

APPEARANCES

FOR THE APPLICANTS:

INSTRUCTED BY:

ADV AB ROSSOUW SC

AFZAL LAHREE ATTORNEYS

FOR THE RESPONDENTS:

INSTRUCTED BY:

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