

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

Case No. 27131/2022

REPORTABLE: NO
OF INTEREST TO OTHER JUDGES: NO
REVISED: NO
21 SEPTEMBER 2022

In the matter between:

WILLEM JACOBUS VENTER N.O.

FIRST APPLICANT

KAREN VAN NIEKERK N.O.

SECOND APPLICANT

KARINA ALETTA VAN NIEKERK N.O.

THIRD APPLICANT

And

THE MASTER OF THE HIGH COURT, PRETORIA

FIRST RESPONDENT

TIRHANI SITOS DE SITOS MATHEBULA N.O

SECOND RESPONDENT

LAILA ENVER MOTALA N.O

THIRD RESPONDENT

**SOUTH AFRICAN RESTRUCTURING AND
INSOLVENCY PRACTITIONERS ASSOCIATION NPC. FOURTH RESPONDENT**

**MINISTER OF JUSTICE AND CONSTITUTIONAL
DEVELOPMENT FIFTH RESPONDENT**

Coram: Millar J

Heard on: 12 September 2022

Delivered: 21 September 2022 - This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to the CaseLines system of the GD and by release to SAFLII. The date and time for hand-down is deemed to be 10H00 on 21 September 2022.

JUDGMENT

MILLAR J

1. On 8 August 2022 I handed down judgment in which I dismissed the application brought by the applicants together with punitive costs *de bonis propriis*. It is against this judgment that the applicants apply for leave to appeal – in respect of both the dismissal of the relief sought (ostensibly for the benefit of the creditors) and also in respect of the cost's orders.

2. In the present application, the applicants in their respective capacities as liquidators of Finalmente Global (Pty) LTD (in liquidation) were represented by the same legal representatives who appeared initially. In their personal capacities and in respect of the costs order, they appointed a different representative.

3. The test for the granting of leave to appeal is set out in S 17(1) of the Superior Courts Act 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.”*

4. In respect of the application for leave to appeal against the dismissal of the application, the applicants raised as grounds a challenge to every finding made in the judgment. The argument on this aspect was essentially a re-presentation of that which was advanced during the hearing and which was dealt with in the judgment.

5. In regard to the costs order, the basis upon which it was advanced was that during the hearing, and in reply, I did not afford counsel an opportunity to deal at all with this aspect. It is so that I did not afford counsel the opportunity.

6. Does this, having regard to the particular circumstances of the matter amount to a failure to afford the applicants their right to be heard? If it does then so the argument went, leave to appeal to the full court of this division should be granted on the question of the costs as a separate issue.

7. In the judgment I found that *“The present application was actuated by self-interest and the applicants sought to impugn the appointment of the second and third*

¹ Act 10 of 2013

respondents, primarily in raising the exercise of the Master's discretion in the absence of a policy, when they themselves had been beneficiaries of such exercise but also in respect of the third respondent by making scandalous and irrelevant allegations in the replying affidavit. Although such allegations were struck out at the commencement of the proceedings with no opposition to the application to do so from the applicants, the fact that such allegations were made is indicative of the desire to prevent the appointment of any further co-liquidators and in particular the third respondent.

The application is clearly self-serving and destructive of the very purpose for which Sections 374 and 368 were amended. It is for this reason that I intend to make the costs order that I do."

8. It was not in issue in the matter nor was it argued that liquidators are required to act jointly². The application brought ostensibly by the applicants for the benefit of the estate did not enjoy the support of the second and third respondents and was thus self-evidently not an action taken by all the liquidators jointly. The very purpose of the application was to have the appointments of the second and third respondents set aside.

9. However dissatisfied with the appointment of the second and third respondents the applicants were, the fact is that they are co-liquidators and would remain so unless their appointment was set aside. The applicants were cognisant of this when they brought the application. Liquidators cannot litigate for their personal interests and expect the estate (and creditors whose interests they are appointed to represent) to bear the costs³. No credible basis was laid at all for the application being in the interests of the estate.

10. I was referred to a number of authorities on this aspect – all of those authorities, which are distinguishable on the facts, deal with circumstances where the person

² Section 382(1) of the Companies Act 61 of 1973

³ Grobbelaar v Grobbelaar 1959 (4) SA 719 (A); Blou v Lampert and Chipkin, NNO and Others 1972 (2) 501 (T) at 507E-F and 509B-C

against whom the order was made was either an attorney⁴ for one of the parties or an employee of one of the parties⁵. In the present circumstances the costs order was made against cited parties who engaged fully and were represented in the proceedings. Furthermore the present proceedings were motion proceedings and so the entirety of the evidence and respective cases was set out in the affidavits filed.

11. The findings and the orders made in consequence of a consideration of what was before the court. Even if counsel had addressed this, the findings made on the papers and orders would not in my view have been different.

12. I have considered the grounds upon which this application for leave to appeal has been brought and the arguments advanced by the parties at the hearing and set out in the heads of argument they filed. I have also considered the reasons for granting the orders of 8 August 2022 and am of the view that there is neither a reasonable prospect that another court would come to a different conclusion nor an arguable point of law or other compelling reason which merits the granting of leave to appeal.

13. In the circumstances, it is ordered that:

13.1 The application for leave to appeal is dismissed.

13.2 The applicants are ordered to pay the first, second and third respondents' costs which costs are to include, the costs consequent upon the employment of two counsel where so employed.

13.3 The costs are to be paid by the applicants *de bonis propriis*, jointly and severally, the one paying the others to be absolved.

⁴ Kgoro Consortium (Pty) Ltd & Another v Cedar Park Properties 39 (Pty) Ltd & Others (935/2020) [2022] ZASCA 65 (9 May 2022)

⁵ Member of the Executive Council for Health, Gauteng v Lushaba 2017 (1) SA 106 (CC)

13.4 None of the costs of the present application will form part of any of the costs of the liquidation of Finalmente Global (Pty) Ltd.

A MILLAR
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

HEARD ON: 12 SEPTEMBER 2022

JUDGMENT DELIVERED ON: 21 SEPTEMBER 2022

COUNSEL FOR THE APPLICANTS: ADV. J CILLIERS SC

ADV. J WESSELS

INSTRUCTED BY: MAGDA KETS INCORPORATED

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COUNSEL FOR THE APPLICANTS(COSTS): ADV. D LEATHERN SC

INSTRUCTED BY:

TINTINGERS INC.

REFERENCE:

MR S TINTINGER

NO APPEARANCE FOR THE 4TH AND 5TH RESPONDENTS.