IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN

Case No: 10717/15

AMERASAN PILLAY, N.O	**1ST APPLICANT**
SHAMINDER RAMPERSAD, N.O	**2ND APPLICANT**
V	
JAHANNA KALISHA REDDY	**1ST RESPONDENT**
COMPANIES AND INTELLECTUAL PROPRTY COMMISSION	**2ND RESPONDENT**
THE REGISTRAR OF DEEDS	**3RD RESPONDENT**

JUDGMENT

DELIVERED ON: 14 DECEMBER 2016

MNGADI AJ:

[1] The applicants in their capacities as joint liquidators seek an order setting aside as null and void and of no force and effect a court order made on 5 February 2015. The court order made on 5 February 2015, amongst other ancillary orders, set aside the voluntary liquidation of Chatsworth Investment (Proprietary) Limited (the company). The 1ST respondent had bought an immovable property from the

company and she was intent to have the property transferred to her.

[2] The first applicant is an insolvency practitioner and the second applicant is a practising attorney. The first respondent is a businesswoman, the second respondent a Registrar of Deeds in the province of KwaZulu-Natal (the registrar) and the 3rd respondent the Companies and Intellectual Property Commission (PIPC) a statutory body.

[3] The KwaZulu- Natal High Court (Gyanda AJP) on 5 February 2015, at the instance of the first respondent, made an order setting aside the voluntary liquidation of the company plus some ancillary relief. In those proceedings the company as well as its directors were cited as the respondents. On 17 September 2015 an application for leave to appeal the order of 5 February 2015 was refused. On 22 August 2016, at the instance of the company (in liquidation) the Supreme Court of Appeal, on petition to it, dismissed the application for leave to appeal on the grounds that there were no reasonable prospects of success in an appeal and there was no other compelling reason why an appeal should be heard.

[4] In an amended notice of motion, in response to a challenge to *locus standi,* the applicants sought to add of a further prayer granting them authority to pursue the application in terms of section 386 (5) and /or section 387 (3) and /or section 388 (1) and/ or (2) of the Companies Act 61 of 1973. The first respondent in her opposing affidavit challenged the *locus standi* of the applicants in that as provisional liquidators they have no legal interest in the winding-up proceedings, and that there had been no creditors' meeting held to pass a special resolution to give power to the liquidators on behalf of the company.

[5] Further, in the amended notice of motion, the applicants sought to join the registrar of deeds (the registrar) as the second respondent and the Companies and Intellectual Property Commission (PIPC) as the third respondent. The intention to amend the notice of motion was served on the applicants and the entities sought to be joined as respondents. No objection was raised. Counsel for the applicants argued that as there was no objection raised, applicants are entitled to regard the notice of motion as having been amended. The reason to join the registrar and the PIPC arose due to issues relating to registration and deregistration of the company subsequent to the court order made on 5 February 2015. It became necessary to join the registrar because the issue of the liquidation of the company was interlinked

with the issue of enforcing the contract of sale and transfer of the immovable property from the company to the first respondent.

[6] The notice of intention to amend the notice of motion supported by the supporting affidavit does not have an endorsement as envisaged in a Rule 28 (2) Uniform Rules that "unless written objection to the proposed amendment is delivered within ten (10) days of the delivery of the notice, the amendment will be effected". The notice of intention to amend was lodged about eight (8) months before the hearing. In my view, the intention to amend is *bona fide* and there is no prejudice to the first respondent or to the entities sought to be joined as respondents. It is allowed. The registrar is joined as second respondent and the PIC is joined as third respondent. (See Krischke v Road Accident Fund 2004 (4) SA 358 (W) at 363)

[7] The applicants seek an order striking out nineteen (19) averments in the 1st respondent's answering affidavit on the grounds that the averments are vexatious and/or scandalous and/or irrelevant. An introductory averment to the said averments state:

'Prior to dealing with founding affidavit of applicant, I wish to raise some preliminary observation about the contents contained therein and the entire application must be adjudged in light thereof'

It was the first respondent's case that there were persons behind the liquidators who were the controlling minds driving the litigation to frustrate her rights. The litigation relating to the setting aside of the voluntary liquidation of the company had been dealt with in various court applications. An application to strike out should not be granted unless the court is satisfied that the applicant will be prejudiced in the conduct of his/her claim or defence if it is not granted. The applicants did not show any real or potential prejudice in the conduct of their claim if the averments objected to be not removed. The averments objected to were not shown to be vexatious or scandalous or irrelevant in the context of the dispute. If the court is in doubt as to whether an averment sought to be struck out as irrelevant is in fact irrelevant it will not strike out the averment. In my view the 1st respondent acted with caution. The application to strike out is refused.

(See Subrule 23(2) of the Uniform Rules; Ahlers NO v Snoeck 1946 TPD 590;

Harding & Parker v John Pierce & Co 1919 OPD 113; Richter v Town Council of

Bloemfontein 1920 OPD 161 at 173-174; Golding v Torch Printing & Publishing Co.(Pty) Ltd 1948 (3) SA 1067 C at 1090)

[8] The 1st respondent argues that condonation should not be granted to applicants' late filing of their replying affidavit. The replying affidavit was filed on 24 February 2016 whereas the opposing affidavit was filed on 4 December 2015. It was thirty six (36) pages long. It is argued that the delay is not satisfactory and sufficiently fully explained and that it was a reckless and intentional disregard on the rules of court. The applicants argue that the delay is sufficiently explained and it is in the interest of justice to grant condonation. In my view, taking into account the December closure, the period of the delay was not unduly long. The first respondent has not shown any prejudice she will suffer if the delay is condoned. Whereas if the delay is not condoned the applicants will be prejudiced *in* being unable to fully present their case before court. In view of the short period of the delay, the explanation of the delay, I am of the view that the explanation is *bona fide* and not patently unfounded. The delay in serving and filing the replying affidavit is condoned.

(See Nedcor Investment Bank Ltd v Visser NO and others 2002 (4) SA 588 (T) at 591)

[9] Regarding the main relief, the applicants state that on 30 December 2015 a special resolution to place the company in voluntary winding-up was adopted. On 19 January 2015 the special resolution was duly registered by the Companies and Intellectual Property Commission which resulted in the commencement of the voluntary winding-up of the company. (Section 352 (2) of the Companies Act 61 of 1973). On 4 March 2015 the applicants were appointed joint liquidators of the company. Consequently, when the court on 5 February 2015 set aside the voluntary winding-up of the company, it is argued, the company (in liquidation) was not represe nted . It could only be represented by the liquidators and they had not been appointed. Section 353 (2) of the companies Act provides:

> 'As from the commencement of a voluntary winding-up all the powers of the directors of the company concerned shall cease except in so far as their continuance is sanctioned:-
>
> (a) by the liquidator or the creditors in a creditors voluntary winding-up.

As a result, it is argued, it was improper for the court on 5 February 2015 to make

the order it made.

[10] The first respondent challenged the *locus standi* of applicants on the basis that since the voluntary winding-up of the company was set aside on 5 February 2015 no appointment of liquidators could be made on 4 March 2015. In my view, the relief sought determines whether a party seeking that relief has *locus standi* or not. The applicants seek to set aside an order which, if it stands, has an effect that they have no interest in the matter. To determine whether they have *locus standi* or not in terms of the judgement they are challenging is to prejudge the issue. The appointment of the applicants as joint liquidators of the company, render them to have an interest in the issue of whether the order setting aside the voluntary winding- up of the company is proper or not. The applicants have not brought the application as part of the winding-up the company but they are challenging an order which undermines their very appointment as liquidators of the company. In my view, without resorting to the provisions of section 386 (5) and/or section 387(3) and /or section 388 (1) and/or (2) of the Companies Act, the applicants have sufficient interest in the relief they are seeking to render them to have *locus standi.*

[11] The applicants argue that it was irregular for the court on 5 February 2015 to set aside the voluntary winding-up of the company. The order made on 5 February 2015 reads as follows:

'In the matter between:
JAHANNA KALISHA REDDY

AND
CHATSWORTH INVESTMENTS(PTY)LTD
(Reg No.[…..] 1st RESPONDENT
POORSHOTIHAM NAIDU 2ND RESPONDENT
MUTHIALOO NAIDOO 3RD RESPONDENT
DABBADIE & PARTNERS 4TH REPONDENT
REGISTRAR OF DEEDS, KWAZULU-NATAL 5TH RESPONDENT
THE SHERIFF OF HIGH COURT, CHARTSWORTH 6TH RESPONDENT

Upon the Motion of Counsel for the Applicant and upon reading the NOTICE OF

MOTION and other documents filed of record

IT IS ORDERED

1. That the voluntary winding-up of the first respondent be and is hereby set aside.
2. The Companies and Intellectual Property Commissioner is directed to forthwith delete all references to the first respondent being in voluntary liquidation and is hereby furthermore directed to reflect the status of the first respondent as "registered "and/or in business".
3. The first respondent is, against payment of the balance of the purchase price, ordered and directed to forthwith effect transfer of the immovable property, known as Erf 988 Umhlatuzana, Registration Division FT, Province of KwaZulu-Natal ....
4. The sheriff of the Court is authorised and directed to do all things necessary, including executing and signing all documents necessary and taking all steps as may be required to effect transfer of the immovable property as aforesaid.
5. The Applicant is interdicted and restrained from effecting transfer of the immovable property to any third party for a period of one (1) year from the date of transfer of the immovable property into the applicant's name subject to the proviso that the first to third respondents are entitled to approach the above court on these papers ,supplemented insofar as same may be necessary and on good cause shown, to extend that period should same be necessary.
6. That an interdict will be registered over the title deed of the immovable property after transfer of the immovable property into the applicant's name ,specifying that the applicant is interdicted and restrained for a period of one (1) year from the date of registration of the property into applicant's name from effecting transfer of the immovable property to any third party and that after the aforementioned period of one(1) year the interdict will lapse and be of no force and effect unless extended by this court as contemplated in paragraph 5.
7. It is directed that this order be put into force and effect notwithstanding any rescission application brought by or on behalf of any one or more of the first

,secondor third respondent against any one or more or all of the orders granted in terms hereof.

8. The first, second and third respondents be directed to pay the costs of this application (being applicant's interlocutory enforcement application dated 8 December 2014) on attorney and client scale, jointly and severally , the one paying the others to be absolved, such costs to include those consequent upon employment of two counsel.
9. It is ordered that first, second and third respondents are precluded from bringing any application for rescission or any application for leave to appeal in respect of any one or more or all of the orders set out herein unless and until the first, second and third respondents have paid the applicants costs of this application as ordered in paragraph 8 above'.

[12] The order exhibits some unusual features probably due to the history of the litigation. The second and third respondents in the proceedings culminating in the order of 5 February 2015 were the directors of the Company. The applicants' remedy in this application are to persuade a court vested with proper jurisdiction that the order made on 5 February 2015 falls to be set aside. The applicants after their appointment on 4 March 2015 became aware of the order made on 5 February 2015. They embarked on legal proceedings to have the said order set aside, namely; in the application for leave to appeal and in the petition to the Supreme Court of Appeal.

Section 353 of the Companies Act provides:

'Effect of a voluntary winding - up on status of company and on directors.

(1) A company which is being wound up voluntary shall, notwithstanding anything contained in its articles, remain a corporate body and retail all its powers to such, but shall from the commencement of winding-up cease to carry on its business except in to far as maybe required for the beneficial winding-up thereof.

(2) As from the commencement of a voluntary winding-up all the powers of directors of the company concerned shall cease except in so far as their continuance is sanctioned....

(a) by the liquidator or the creditors voluntary winding-up; or

(b) by the liquidator or the company in general meeting in a members voluntary winding-up.'

In view of the provisions of Section 353, it is arguable whether the company was properly represented or not in the court proceedings culminating in the order made on 5 February 2015. However, it is not necessary to decide the issue in these proceedings

[13] The applicants, having become aware of the order of 5 February 2015, brought an application for leave to appeal the 5 February 2015 judgment. On 16 September 2015 the application for leave to appeal was refused. A petition to the Supreme Court of Appeal for special leave to appeal was also dismissed on 22 August 2016.

[14] The applicants have not succeeded in the appeal process to persuade the relevant courts that the decision of the court on 5 February 2016 is wrong. They now approach this court for a similar relief. This court is in the same level as the court which gave judgement on 5 February 2015. It has no power to review or set aside on appeal the decision of the court which gave judgement on 5 February 2015.

[15] The first respondent has argued that the applicants' remedy was to appeal the judgement and not to apply to declare the judgement a nullity. It is trite that judgements are presumed to be correct to promote certainty in law. Whether the 5 February 2015 judgement falls into the category of judgement that could only be set aside on appeal or review, or whether in falls into the limited category of judgements they may be declared a nullity, in my view, does not arise in this matter. It does not arise because the applicants elected to appeal the judgement. Having so elected, they are bound by their election.

[16] The position of the judiciary is entrenched in the Constitution. A judgement or order of a court binds all persons to whom and organs of state to which it applies. It remains operative until set aside on appeal or review. It can only be reviewed or set aside on appeal by a court with competent authority to review or set aside the decision of the court that delivered the judgement. The hierarchy of courts is fundamental to certainty and the principle of precedent is core to the functioning of the judiciary.

(See Sections 2, 165 (1), and 165(5) of the Constitution; Department of Transport and Others v Tasima (Pty) Limited [2016] ZACC 39 para 179).

[17] This court has no jurisdiction to review or set aside the decision of the court which gave judgement on 5 February 2015. It is ordered that the application is dismissed with costs.

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MNGADI AJ

APPEARANCES

Case Number	:	10717/15
Applicant	:	A Pillay & Ano.
Represented by	:	V.I Gajoo S. C.
Applicant's Attorneys	:	Suren Moodley Incorporated
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Respondent	:	J.K Reddy
Represented by	;	Adv R A Solomon SC
		Adv A MacManus
Respondent's Attorney	:	Atisha Ghela and Associates
Date of Hearing	:	16 November 2016
Date of Judgment	:	14 December 2016