



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 72268/2013

(1) REPORTABLE: YES / NO.	
(2) OF INTEREST TO OTHER JUDGES: YES / NO.	
(3) REVISED. <i>OK</i>	
<i>1/6/2015</i>	<i>SKabie</i>
DATE	SIGNATURE

1/6/2015

In the matter between:-

N.M. ANDERSON N.O.

First Applicant

J.B. ANDERSON N.O.

Second Applicant

R. ANDERSON N.O.

Third Applicant

and

ABSA BANK LTD

Respondent

J U D G M E N T

Rabie J:

1. This is an application in which the applicants, in their capacities as trustees of the Anderson Family Trust ("the trust"), seek leave to appeal against the final sequestration order that the respondent obtained against the trust on 26 January 2015. Coupled with this application is an application for condonation for the late service of the Application for Leave to Appeal.
2. Both the applications were opposed and both Senior Counsel who represented the respective parties and who had filed extensive heads of argument in support of their submissions, argued a full day to convince me of their respective viewpoints. I must add, however, that the arguments were not repetitive but dealt with the numerous issues and disputes which are relevant for the adjudication of this matter.
3. The background of the matter is briefly the following. The respondent initially applied for the provisional sequestration of the trust based on money allegedly owed in respect of three loan agreements and one suretyship agreement. The application was opposed and argued before Makgoba J. Makgoba J rejected the arguments on behalf of the applicants and granted the provisional order of sequestration.
4. On the return date of the provisional order, i.e. 26 January 2015, the matter was called before me presiding in the opposed motion court. The matter was not on the roll for that day and advocate Terblanche SC, appearing on behalf of the respondent, mentioned the matter from the bar shortly before the tea

adjournment. Before and after the tea adjournment I was briefly informed of the nature of the application and also of the fact that the applicants were not at court to oppose the return date and that they would not appear. The transcription of the record of proceedings relating to both the provisional order and the final order form part of the record of the present applications.

5. The papers were voluminous and were not studied by myself before granting the final order. I relied on the submissions by counsel and on the fact that there was no appearance on behalf of the applicants. I should add as an aside, although it might not be altogether relevant in the present scheme of things, that it now appears from an answering affidavit of the respondent's attorney of record, that the third applicant had telephonically informed him that he was on his way to court. The attorney then apparently informed him that I had stood the matter down and that the respondent would proceed with the application if the third applicant failed to appear at court. I assume that this telephonic conversation could only have occurred during the tea adjournment since that was the only time when there was a break in the proceedings relating to this particular application. Having regard to these facts, I must add that if I had been made aware of the third applicant being on his way to court, I would not have issued a final order in the manner and at the time which I did. I would have insisted on further enquiries being made and for the true facts to be placed before me before making a final order by default.
6. To return to the two applications before me: The application for condonation resulted from the fact that the application for leave to appeal was served 15 days

late. The respondent oppose the application on the following grounds: firstly that the order was not appealable as it was a default judgement granted under circumstances where the trust elected not to oppose the application on the return date; secondly, that the trust was in wilful default on the return date; and, thirdly, that the trust acquiesced in the final sequestration order and that the appeal has become perempted.

7. On behalf of the applicants it was submitted that they had until 16 February 2015 to serve and file the application for leave to appeal. Furthermore, that after the final sequestration was granted, the third applicant immediately took action, made enquiries and spoke to various legal professionals to ascertain what the consequence of the final sequestration order entailed and which remedy was available. It was further stated that he consulted with an attorney who eventually handed him back the documents of the sequestration application for the reason that he, the attorney, had a relationship with the auctioneers who were involved in the possible sale of the assets of the trust. During the week of 23 February 2015 the applicants consulted with the present attorney who firstly required a deposit to be made to him. Such funds could only be secured by 2 March 2015 and the attorney then proceeded with further steps which culminated in the application for leave to appeal.
8. As far as the sale of property is concerned it was submitted that this was attempted in order to save the trust from sequestration because if the farms were sold, all the alleged debts of the trust could have been paid and the final order for sequestration rescinded.

9. In my view, on the papers before me, the applicants have at all times intended to attack the final order for sequestration and that the delay in filing the application for leave to appeal had been fully explained. Furthermore that the delay is of quite a short duration and there was no prejudice to the respondent. The issue as to whether the order is appealable is one which is also relevant for purposes of the application for leave to appeal. That issue is hotly disputed between the parties and should not in my view prevent the condonation from being granted.
10. Consequently I am of the view that a proper case for condonation had been made out and that such an order should be granted.
11. That brings me to the application for leave to appeal. A vast number of issues were in dispute between the parties. In light of the decision to which I have come in respect of that application it is not necessary for me to refer to all of these disputes and neither is it necessary for me to refer to the submissions made in that regard on behalf of the respective parties. It is also not necessary for me to relate my views in respect of the issues and it would in fact be inappropriate to do so.
12. The first issue which was argued by the parties before me was whether the provisions of section 17 (1) of the Superior Courts Act, Act 10 of 2013, have changed the test to be applied in applications for leave to appeal and, if so, what such test entails exactly.
13. As stated above, an issue which was hotly debated between the parties relates to the question whether the final order, which was granted in the absence of the

applicants, is appealable or not. Although section 149 (2) of the Insolvency Act provides for the rescission of an order, the question was argued whether such a route was available, or, if so, whether it was appropriate, in the circumstances of this case. The numerous disputes of fact may play a role in this regard and may be conclusive. But apart from this, the question was also debated as to the effect of the provisions of section 150 (1) of the Insolvency Act which allows for an appeal. None of the counsel could refer me to clear authority in respect of these issues and in their references to general principles which they submitted I should apply, they relied on divergent and possibly obiter views from eminent Judges. In my view this is an issue fit for a court of appeal.

14. At the heart of this application lies the question as to the effect of decisions taken by trustees without a trustee of the kind specified in the trust deed. The court which heard the main argument before granting a provisional order did not really address this issue in its judgement and neither was it considered by myself before granting the final order. I am of the view that this issue and the effects it may have on the final adjudication of this matter, is such that it is fit for adjudication by a court of appeal.
15. Hand in hand with the aforesaid issue goes the issue of whether an applicant applying for the sequestration of a respondent, and who was required to set out the cause of its claim against the respondent, can rely on a different cause if the first mentioned cause turns out to be without foundation. Counsel could not refer me to authority on this point and neither could I find same in the time available. In

my view this issue, which is of great importance and which mainly resulted in the provisional order, also requires the attention of a court of appeal.

16. It is not necessary that I refer to the other issues in dispute between the parties. In my view the appeal has a reasonable prospect of success and leave should accordingly be granted.
17. As far as costs are concerned I am of the view that such costs should be reserved. Although I propose to grant the application for condonation, the costs of such condonation should also be reserved. Since the issue of costs is to be adjudicated by the court of appeal the question whether such costs should include the costs of two counsel, shall also be a matter for such court of appeal.
18. In the result the following order is made:
 1. Condonation is granted to the applicants for the late filing of the Application for Leave to Appeal.
 2. The applicants are granted leave to appeal to the Supreme Court of Appeal.
 3. The costs of the condonation application as well as the application for leave to appeal are reserved for decision by the Supreme Court of Appeal.



C.P. RABIE
JUDGE OF THE HIGH COURT