

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No. : 2381/2014

In the matter between:-

PBD BOEREDIENSTE (PTY) LTD

Applicant

and

CAREL JOHANNES CLAASSENS N.O.

1st Respondent

GUSTAV LOURENS CLAASSENS N.O.

2nd Respondent

RIAAN AHRENS N.O.

3rd Respondent

HENRY PETER JOHNSON N.O.

4th Respondent

RETMIL FINANCIAL SERVICES (EDMS) BPK

5th Respondent

THE REGISTRAR OF DEEDS, BLOEMFONTEIN

6th Respondent

THE MASTER OF THE FREE STATE HIGH COURT,

BLOEMFONTEIN

7th Respondent

JUDGMENT ON APPLICATION FOR LEAVE TO APPEAL

JUDGMENT BY: KRUGER, J

DELIVERED ON: 5 NOVEMBER 2015

- [1] These are applications for leave to appeal against the judgment of Murray AJ. The parties are referred to as in the main application. This application is dealt with on the written submissions made by

counsel, Mr JHD Bloem on behalf of the first respondent and Mr P Uys on behalf of the applicant.

- [2] The applicant applied for an order cancelling two deeds of transfer and for an order registering certain sectional title units into the name of the Anna Maria Magdalena Claassens Trust (the AMCC Trust).
- [3] The first respondent is the only trustee of the AMCC Trust. The second respondent is the son of the first respondent. The second, third and fourth respondents are trustees of The Lowerkruin Trust, in whose name the properties are at present registered. The fifth respondent is Retmill Financial Services (Pty) Ltd, a bondholder over the properties. The sixth respondent is the Registrar of Deeds, and the seventh respondent is the Master of the Free State High Court.
- [4] On 25 June 2015 Murray AJ dismissed the application but ordered the first respondent to pay the costs of the application in his personal capacity.
- [5] The first respondent filed an application for leave to appeal against the costs order against him. Thereafter the applicant filed a notice of an application for leave to cross-appeal against the dismissal of its application, together with an application for condonation for the late filing thereof. Condonation is not opposed and should be granted. The applicant does not oppose the first respondent's application for leave to appeal against the costs order on the basis

that it is in the interests of justice to allow the applicant to proceed with the cross-appeal.

- [6] One of the reasons why the applicant brought the present application is to obtain an order for the transfer of the properties into the name of the AMCC Trust and to declare the properties specially executable for the debt of about R220 000 owed by the first respondent to the applicant as appears from the founding affidavit. A bond of R890 000 was registered over one of the properties in favour of the fifth respondent in 2013. If the property is transferred to the AMCC Trust the third respondent, against whom no allegations of fraud are made, will lose its security. As Mr Reinders pointed out in his heads of argument before Murray AJ, the applicant is not without remedy to get payment from the AMCC Trust. Firstly it can obtain a *nulla bona*. Then it can apply for sequestration of the trust, after which a liquidator can investigate the circumstances of the transfer of the properties and take appropriate steps. In my view there are no reasonable prospects that another court will come to a different conclusion on the applicant's claim.
- [7] The conduct of the first respondent is important to adjudicate the applicant's claim. The costs order was made because Murray AJ censured the conduct of the first respondent in the litigation. The applicant contends that the fraudulent nature of the transfers are apparent from delay caused by the first respondent. However, from the answering affidavit and annexures it is apparent that delays were caused by the legal complexities of the will.

- [8] It does not appear from the judgment that Murray AJ considered the costs of the other respondents, including the fifth respondent. There are reasonable prospects that another court may find that the costs order was not justified.

ORDER

1. The first respondent is granted leave to appeal to the Full Bench of this division against the costs order made against him by Murray AJ. Costs of the first respondent's application for leave to appeal are costs in the appeal.
2. The application for leave to appeal in the cross-appeal is refused. The applicant (PBD Boeredienste) is to pay the costs of the cross-appeal.

A. KRUGER, J

On behalf of First Respondent: Mr JHD Bloem
 Instructed by:
 Spangenberg Zietsman & Bloem
 BLOEMFONTEIN

On behalf of Applicant: Adv P Uys
 Instructed by:
 Symington & De Kok
 BLOEMFONTEIN