CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 60/00

MICHAEL LANE N.O. First Applicant

EILEEN FEY N.O. Second Applicant

versus

HEINO DABELSTEIN AND 12 OTHERS Respondents

Decided on : 6 March 2001

JUDGMENT

GOLDSTONE and KRIEGLER JJ:

[1] This is an application for special leave to appeal to this Court against a judgment and order of the Supreme Court of Appeal (SCA) in a case between two opposing sets of foreign creditors in the insolvent estate of a certain Mr Jürgen Harksen. The effect of the order was to set aside an attachment of South African assets of the respondents in order to found and confirm the jurisdiction of the Cape Provincial Division of the High Court.[1] The attachment order had been obtained by the other set of creditors suing in the name of the applicants, who were the trustees in the insolvent estate. They wished to bring an action to set aside as voidable dispositions two payments made to the respondents by the insolvent pursuant to orders of court.

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1 The judgment of the Cape High Court ordering the attachment is reported as *Lane and Another v Dabelstein and Others (Lane and Another NNO Intervening)* 1999 (3) SA 150 (C).

[2] The definition of "disposition" in section 2 of the Insolvency Act, 24 of 1936, excludes a "disposition in compliance with an order of . . . court". In *Sackstein en Venter NNO v Greyling*[2] it was held that the exclusion does not apply to orders fraudulently obtained or obtained pursuant to agreements concluded in order to defeat the claims of other creditors. In the High Court, Van Zyl J followed *Sackstein* and granted the attachment on the basis that a prima facie case of fraud had been established. The SCA upheld the appeal on the basis that the factual averments contained in the affidavits of the applicants did not establish a prima facie case of fraud.

[3] In seeking leave to appeal to this Court the applicants allege that the case raises the following constitutional issues:

(a) The order of the SCA violated the applicant's right of access to the courts in violation of section 34 of the Constitution;

(b) The fact that peregrini require an attachment to found and confirm jurisdiction even though a ground of jurisdiction exists, whereas incolae do not, constitutes unfair discrimination against peregrini in violation of section 9 of the Constitution; and

(c) The SCA failed to consider crucially important evidence contained in the applicants' affidavits and thereby violated the applicants' "right to a fair trial and to fair justice" (presumably also under section 34 of the Constitution).

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2 1990 (2) SA 323 (O).

The respondents oppose the application and seek the costs thereof.

[4] In our opinion the application should not be granted. There is no substance in the ground raised in 3(c). Even if the SCA had erred in its assessment of the facts, that would not constitute the denial of the constitutional right contended for. The Constitution does not and could hardly ensure that litigants are protected against wrong decisions. On the assumption that section 34 of the Constitution does indeed embrace that right, it would be the fairness and not the correctness of the court proceedings to which litigants would be entitled.

[5] The grounds raised in 3(a) and (b) are constitutional issues. However, they were not raised in either the High Court or the SCA. The applicants could have brought their application for an attachment and, in the alternative, claimed an order declaring the common law rule requiring such attachment to be unconstitutional. This would have alerted both the High Court and the SCA, as well as the respondents, to the fact that this was a basis being relied upon by the applicants. More importantly it would have enabled those courts to deal with the constitutional questions. The rules relating to attachment to found or confirm jurisdiction in cases against peregrini are rooted in the common law. Where the development of the common law is the issue, the views and approach of the ordinary courts, and particularly the SCA, are of particular significance and value. Save in special circumstances, this Court should not consider this kind of matter as a court of first instance.[3] No relevant factors have been raised by the applicants that would constitute such special circumstances.

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[3] See *Dormehl v Minister of Justice and Others* 2000 (2) SA 987 (CC), 2000 (5) BCLR 471 (CC) at para 5, *Transvaal Agricultural Union v Minister of Land Affairs and Another* 1997 (2) 621 (CC), 1996 (12) BCLR 1573 (CC) at para 18, *S v Bequinot* 1997 (2) SA 887 (CC), 1996 (12) BCLR 1588 (CC) at para 15.

[6] On the contrary, it is contended on behalf of the applicants that "[t]he issues are of pivotal significance and importance to trade and commerce in South Africa , and to this country's external relationship with foreign business entities." Circumstances of such weighty legal import and bearing such wide-ranging commercial implications ought not ordinarily to be considered by this Court unless and until they have been thoroughly canvassed in the courts that are more directly concerned with such matters. It is in any event undesirable — and may well work injustice on the other side — to allow such a fundamental change of front at this late stage of the proceedings.

[7] We are therefore of the opinion that the application should be dismissed and that the costs of the application should be paid by the applicants.

[8] The following order is made:

The application is dismissed with costs.

Chaskalson P, Ackermann J, Madala J, Mokgoro J, Ngcobo J, Sachs J, Yacoob J, Madlanga AJ and Somyalo AJ concur in the judgment of Goldstone and Kriegler JJ.