THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

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Centaur Mining South Africa (Pty) Ltd v Cloete Murray N O and Others (Case no 1334/2022) [2024] ZASCA 34 (28 March 2024)

Today the Supreme Court of Appeal (SCA) handed down judgment dismissing, with costs, including the costs of two counsel an appeal against the decision of the Gauteng Division of the High Court of South Africa, Johannesburg (the high court).

The appellant, Centaur Mining South Africa (Pty) Ltd (CMSA), appealed against a judgment of the Gauteng Division of the High Court, Johannesburg, per Wepener J (the high court), dismissing an application for the setting aside or rescission of a judgment under s 354 of the Companies Act 61 of 1973 (the 1973 Companies Act), alternatively r 42(1)*(a)* of the Uniform Rules of Court or the common law (the rescission application). The appeal was with leave of the high court.

The background facts were as follows: The Trillian group of companies included the first to tenth respondents: Trillian Capital Partners (Pty) Ltd (TCP), Trillian Management Consulting Pty Ltd (TMC), Trillian Securities (Pty) Ltd (TS), Trillian Property (Pty) Ltd (TP), Trillian Nominees (Pty) Ltd (TN), Trillian Financial Advisory (Pty) Ltd (TFA), and Trillian Shared Services (Pty) Ltd (TSS). TCP owned 100 per cent of the shareholding in TCP, TMC, TS, TP, TN, TFA, and TSS. Zara W (Pty) Ltd (Zara) owned 100 per cent of the shareholding in TCP. The Trillian group of companies was established pursuant to a failed bid by the Gupta family (associated with the so-called state government officials and entities) in 2014 to acquire the Regiments group of companies. Mr Eric Anthony Wood (Mr Wood) was the former chief executive officer of Regiments (Pty) Ltd (Regiments). It was a 'fund manager' and 'strategy advisor' specializing in public sector infrastructure programs and projects, supposedly rendering services to state owned entities (SOE's), such as Transnet SOC Ltd (Transnet) and Eskom SOC Ltd (Eskom). Mr Wood was the sole director of TMC prior to its liquidation and also the controlling mind of TMC and certain other entities within the Trillian group of companies. TCP and TMC were financial advisory companies, who conducted similar business to Regiments.

During January 2020 the South African Revenue Services (SARS) formed the view that Mr Wood was treating the Trillian group of companies under his control as a mere extension of himself. He was at all relevant times responsible for the financial affairs of the companies but either failed to submit tax returns when due, or submitted returns that contained incorrect declarations. Mr Wood, according to SARS's investigation, received SOE funds in the hands of a Trillian company and the funds would subsequently be channelled to various other entities through the creation of what appears to have been fictitious invoices purportedly issued by another Trillian company which to all intents and purposes was not trading or conducting any form of business. The fictitious invoices were intended to fraudulently misrepresent a legitimate *causa* to extract funds out of a Trillian company and ultimately to funnel the funds into the hands of the ultimate beneficiaries. Following an investigation, SARS issued letters of audit findings to TMC. In summary, the letters of audit findings were based on a comparative analysis of source documents submitted to SARS by TMC, as well as its bank statements, VAT schedules, invoices, draft annual financial statements, trial balances, general ledgers and other financial documentation of certain Trillian companies.

In light of the seriousness of the allegations levelled against Mr Wood and some of the Trillian companies under his control, SARS brought a preservation application as contemplated by s 163 of the Tax Administration Act 28 of 2011. The application was successful, and Mr Cloete Murray (Mr Murray) was appointed as the curator in terms of the order. In that capacity, Mr Murray instructed a chartered accountant and forensic auditor, Mr Stephen Robinson (Mr Robinson), to investigate the affairs of TMC and TCP. Mr Robinson issued out two reports (23 February 2020 report and 8 July 2020 report) where it was discovered that large sums of monies where fraudulently transferred from one Trillian Group company to the next. Mr Robinson's findings evinced in no uncertain terms that TMC and the other Trillian companies were not only incorporated or used in a manner that constitutes an unconscionable abuse of the juristic personality, but also that the companies conducted business in a fraudulent manner and for a fraudulent purpose.

On 18 June 2019, the Gauteng Division of the High Court of South Africa, Pretoria (the high court, Pretoria) inter alia granted judgment against TMC and TCP to repay to Eskom the sum R595 228 913.29 plus interest and costs. The judgment debt remained unpaid. As a result, on 17 January 2020, Eskom issued a liquidation application in the high court, Pretoria. On 9 March 2020, it was finally wound up by order of that court. The Master of the High Court appointed Mr Murray, Ms Sivalutchmee Moodliar and Mr Ndumiso Sibiya as the joint provisional liquidators of TMC (the liquidators). On 25 September 2020, the liquidators initiated motion proceedings in the high court against the Trillian Group Companies seeking relief in terms of s 20(9) of the Companies Act 71 of 2008 (the Companies Act) for a declaration that the Trillian Group of companies was not a juristic person and have its corporate veil lifted, which would allow the court to disregard the separate legal personality of the company. An interim order was granted in the high court and on 20 January 2021, the high court confirmed the final order.

Then on 4 February 2021, the liquidators instituted an action against CMSA on the grounds that an aggregate amount of R210 298 901 repaid by TSS to CMSA pursuant to a loan agreement concluded between the two entities, an aggregate amount of R69 956 099 repaid by TFA to CMSA pursuant to a loan agreement concluded between the two entities, and the amount of R160 246 000 repaid by TMC to CMSA pursuant to the loan agreements, constituted voidable dispositions as contemplated in ss 21, 29 or 31 of the Insolvency Act 24 of 1936, and for such payments to be set aside and repaid to the liquidators for the benefit of the creditors of the Trillian group of companies in liquidation. This prompted CMSA to launch an application in the high court, on 5 August 2021, seeking an order that the s 20(9) order 'be rescinded and set aside' under s 354 of the 1973 Companies Act, r 42(1)*(a)* of the Uniform Rules of Court or the common law (the rescission application).

CMSA contended that it was erroneous and incompetent for the high court to grant the relief set out in its order, collapsing the subject companies into TMC (in liquidation) and to have placed them under a composite winding-up with TMC. On 12 September 2022, the high court delivered its judgment. It dismissed the rescission application with costs, including those of two counsel. It held that no case was made out for any relief under s 354 of the 1973 Companies Act or under the common law. It further held that the case for CMSA did not fall within the category of cases that qualify for rescission based on an erroneous order under rule 42(1)*(a)*. It nevertheless undertook an interpretive analysis of s 20(9) of the Companies Act and concluded that the provisions of s 20(9) were wide and would not only have permitted of such an order but the circumstances of this matter call for such an order. In this regard, it further stated: 'It would be untenable that a main fraudster can be liquidated and that when the co-conspirators were discovered and found to be holding the assets and being solvent, that the court would not have exercised the powers in terms of s 20(9), as it happened in this matter.'

In its findings, the SCA concurred with the high court's findings that no case was made out for any relief in terms of s 354 of the 1973 Companies Act or under the common law. It held that CMSA's founding affidavit advanced no case for the setting aside of the s 20(9) final order under s 354 or for rescinding that order in terms of the common law. Its case, to the extent that there was one, rested squarely on r 42(1)*(a)* of the Uniform Rules of Court, which states that the court may rescind or vary an order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby. The SCA further held that the liquidators were in terms of the Uniform Rules of Court entitled to approach the high court for the interim s 20(9) order and the s 20(9) final order. CMSA's subsequently disclosed defence (should there be one) based on its interpretation of s 20(9) of the Companies Act, could not transform the validly obtained judgments into erroneous judgments. In truth, the rescission application was nothing else but a disguised appeal. However, CMSA did not have a right of appeal against the s 20(9) final order. The Court also held that it was doubtful that any of the respondents, CMSA included, would have been able to successfully invoke r 42(1)*(a)*. Moreover, held the Court, the composite

winding-up order was granted more than three years ago and the liquidators and creditors of the subject companies had an interest in its finality. In conclusion, the SCA also held that the progress of the winding-up was a weighty consideration within the context of the exercise of a court's discretion whether to grant rescission of a judgment under r 42(1)*(a)* of the Uniform Rules of Court. As a result the appeal was dismissed with costs, including those of two counsel.

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