IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case No. 34145/2020

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED: NO

02/07/2024

DATE

[redacted]

SIGNATURE

RAMA ANNADALE MONONDE ATTORNEYS **Applicant**

And

MARTINUS JACOBUS BEKKER N.O **First Respondent**

C. GOVENDER **Second Respondent**

(In their capacities as the duly appointed Trustees

In the insolvent estate of Belinda da Wit

(I.D [redacted])

Dane Lee de Wit (I.D [redacted])

JUDGMENT: APPLICATION FOR LEAVE TO APPEAL

MOGOTSI AJ

Introduction

1. This is an application for leave to appeal against the judgment and order handed down on 22 February 2023 by Mnqibisa-Thusi J, who is unavailable to adjudicate the same.

2. The application is premised on the grounds listed in the Application for Leave to Appeal dated 15 March 2023. In essence, the application is premised on the following four grounds: To begin with, the Applicants submit that the court a quo erred in permitting the Respondents to cure substantial defaults, vague allegations and unsubstantiated claims in their founding affidavits and allowed him to rely on the Replying Affidavit. In addition, the court a quo found that there was a dispute of facts on the source of the payments and misdirected itself on the application of the Plascon-Evans rule. Furthermore, the court a quo erred in allowing the Respondents to rely on hearsay evidence. Lastly, the court a quo ordered payment of R102 730.00 instead of R102 307.02 claimed by the Respondents and that the court a quo should have ordered payment of R88 307,02.

Legal Principles

3. The legislative framework for considering an application for leave to appeal is set out in section 17(1) of the Superior Court's Act that1 Act 10 of 2013 provides as follows:

(1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that: -

(a) *(I) the appeal would have a reasonable prospect of success; or*

(b) *(ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;*

4. As to the test to be applied by a court in considering an application for leave to appeal, Bertelsmann J in ***The Mont Chevaux Trust v Tina Goosen & 18 Others 2014 JDR 2325 (LCC)*** at para 6 stated the following:

> *"It is clear that the threshold for granting leave to appeal against a judgment of a High Court has been raised in the new Act. The former test whether leave to appeal should be granted was a reasonable prospect that another court might come to a different conclusion, see* **Van Heerden v Cronwright & Others 1985 (2) SA 342 (T) at 343H**. *The use of the word "would" in the new statute indicates a measure of certainty that another court will differ from the court whose judgment is sought to be appealed against.'*

Evaluation

5. The court a quo in allowing the Respondents to rely on their Answering Affidavit, did so on the premise that the Respondent's case from the commencement of the matter has always been that the monies paid to the Applicant were from funds which should have been channelled into the account of the insolvent estate and that Mrs de Wit's earnings only came about when raised by the Respondent in his answering affidavit. In my view, the Answering affidavit does not contain new evidence and the court a quo cannot be faulted for allowing the Respondent to rely thereon.

6. Upon careful perusal of the judgement the court a qou in its application of the Plascon-Evans rule, stated that the Applicant's contention that the funds received were part of the income of Mrs de Wit does not raise a genuine dispute of fact because he failed to substantiate the same by failing to file a confirmatory affidavit from Mr de Wit or anyone connected with her employment as to the extent of Mrs de Wet's earnings. Therefore, the submission of the Applicant's counsel in this regard is not persuasive and falls to be dismissed.

7. The court a qou, amongst others, relied on the testimony given at the insolvency inquiry and the submission by the Applicants' counsel that the court a quo relied on hearsay evidence has no merit and falls to be rejected.

8. The court a quo in its order stated the amount which differs from the total amount mentioned in its evaluation of the evidence and this in my view, is a genuine typographical error. In his address, counsel for the Respondent submitted that the Respondent relinquished a certain portion of the amount claimed and is amenable to accepting the amount stated in the order because the Applicant will not be prejudiced. He further submitted that, alternatively, Rule 42 (1) (b) of the Uniform Rules of the Court may be invoked to remedy the situation. The submission does not persuade me because the said Rule applies to Default Judgements and the judgment in casu is not. I, however, cannot comprehend the Applicant's insistence on this issue because it counts in their favour. Consequently, I am of the concerted view that it will not be in the interest of justice to delay the finality of this matter solely on this issue because the Applicant will not be prejudiced thereby.

9. For the reasons mentioned above, I am not persuaded that there exists a measure of certainty that another court will differ from the court a quo, and the application falls to be dismissed.

10. I see no reason why the costs should not follow the results.

Order

Therefore, the following order is made:

1. The application for leave to appeal is dismissed with costs on scale "C".

P J M MOGOTSI
Acting Judge of the High Court
Gauteng Division, Pretoria

Appearances:

For Applicant: Adv A Louw SC & Adv K Groenewald instructed by Rama Annadale Mononde Attorneys.

For Respondents: Adv J Van der Merwe SC instructed by Couzyn Hertzog & Horak

Date heard: 10 June 2024

Date of Judgment: 02 July 2024