THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

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The Prudential Authority v Dlamini and Another (36/2023) [2024] ZASCA 133 (02 October 2024)

Today the Supreme Court of Appeal (SCA) upheld an appeal, with costs, against the decision of the KwaZulu-Natal Division of the High Court, Pietermaritzburg (the high court).

Mr Mkhululi Dlamini and Mrs Nosipho Dlamini (the Dlaminis) participated in the Travel Ventures International scheme (TVI scheme) in 2009. The business of TVI was modelled on a scheme which marketed the sale of travel vouchers which purportedly provided the recipient with significant discounts for international travel and accommodation. The Dlaminis opened various bank accounts into which they deposited money they received from the investors. The same bank accounts were used to make payments to the investors. Following a directive issued by the Governor in terms of s 12 of the South African Reserve Bank Act 90 of 1989 (SARB Act), and the subsequent inspection of the Dlaminis' affairs, they were found to have obtained money by conducting the business of a bank without being registered as a bank and without authorisation to do so. The inspection therefore confirmed that the Dlaminis received money unlawfully and in contravention of the provisions of the SARB Act.

On 14 March 2016, the Dlaminis were in formed in writing that the inspection that had been conducted revealed that the true amount of money unlawfully obtained by them was R2 827 450. They were further directed to repay this amount within a period of ten days with interest at 9 percent, per annum from date of the directive or alternatively, to make a repayment plan. The Dlaminis were advised that they had a right to review or appeal against the directive under s 9(1) of the Banks Act 94 of 1990 (the Banks Act) within 30 days after the directive. The Dlaminis subsequently failed to repay the true amount of money unlawfully obtained within the ten-day period or make a repayment plan or review or appeal against the directive within the said 30-day period.

The Appellant subsequently applied for the sequestration of the Dlaminis, firstly, on the grounds that they had committed an act of insolvency by failing to comply with the directive issued in terms of s 83(1) of the Banks Act directing them to repay the money they had obtained by carrying on the business of a bank in contravention of that Act. Secondly, in terms of s 84(1A)(*a*), the Dlaminis were factually insolvent. The high court dismissed the application on the basis that the appellant had failed to show that the Dlaminis were *prima facie* insolvent and relied further upon the exercise of its discretion. The appeal was with the leave of the high court.

The issues before the SCA were therefore, firstly, whether ss 83 and 84 of the Banks Act required proof of factual insolvency for the sequestration of a person under those sections, or whether mere proof of non-compliance with a directive issued under s 83 was a sufficient ground for sequestration. Secondly, whether this Court may interfere with the high court's discretion to refuse the application.

In addressing these issues, the SCA, in a majority judgment penned by Zondi JA (Seegobin and Keightley AJJA concurring) found that the evidence established that the Dlaminis obtained money through their participation in the TVI scheme which entailed carrying on the business of a bank without being authorised to do so. The amount which they were directed to repay was disclosed in the directive that was issued and they failed to repay it as directed. In terms of s 83, they were deemed to have committed an act of insolvency and the question of proof of factual insolvency became irrelevant. It was held further in regard to the high court's refusal to grant a sequestration order on the ground of the appellant's unreasonable delay in bringing the application that the high court misdirected itself. The delay was held not attributable to the appellant. The high court ignored the period of delay that occurred when the parties attempted to settle the matter and its failure to consider that relevant fact constituted a material misdirection and it could not be said that it exercised its discretion judiciously. This Court, because of the material misdirection committed by the high court, was entitled to interfere with the exercise of the discretion by the high court.

As a result, the appeal was upheld and the order of the high court was set aside and replaced with an order placing the Dlaminis under provisional sequestration. The Master of the Kwa-Zulu Natal Division of the High Court, Pietermaritzburg ('the Master'), was directed to appoint the person nominated by the appellant to act as provisional trustee of the Dlaminis' joint estate, in accordance with the provisions of s 84(1A)(*b*) of the Banks Act 94 of 1990. A rule *nisi* was issued calling upon all persons with a legitimate interest to advance reasons, if any, on a date to be determined by the court, why the estate of the respondents should not be placed under final sequestration in the hands of the Master. The costs of the application were ordered to be costs in the administration of the insolvent estate.

The minority judgment, per Mbatha and Kgoele JJA, reasoned that the central issues were in fact, firstly, whether in light of the deeming provision in s 83(3)(*b*), there was any need to establish that the Dlaminis were insolvent. The second issue is whether the appellant made a *prima facie* case for the provisional sequestration of the Dlaminis and lastly, whether this Court may interfere with the discretion exercised by the high court in refusing to grant the provisional order.

In dealing with these issues, the learned judges took the view that the issuing of a s 83(1) directive and its non-compliance was not a stand-alone ground for the appellant to sequestrate or liquidate the Dlaminis. In interpreting s 83(3)(*b*), the minority judgement reasoned that the section refers to the failure to adhere to the notice of the repayment of the money, which was deemed to be an act of insolvency. The learned judges further pointed out that the section confers on the appellant a competence to apply for the sequestration of a person who fails to comply with the repayment directive, thus meaning that the deeming provision only provided the appellant with *locus standi* to apply for the sequestration or liquidation of such a person and not a cause of action. In interpreting s 84(1A)(*a*), the minority judgment found that the appellant was required to determine whether the Dlaminis were technically or legally insolvent, in order to establish a *prima facie* case for their provisional sequestration.

In coming to a conclusion of whether the appellant had established a *prima facie* case against the Dlamini's, the minority judgement found that the appellant had failed to establish a *prima facie* case against the Dlamini's. It was found the that the repayment administrator misconstrued the principles applicable to the sequestration of a natural person with those applicable to a juristic person; the valuation method of the Dlaminis' property fell short of the fundamental requirements of a valuation; and the high court was therefore correct in finding that the repayment administrator failed to prove that the Dlaminis' liabilities exceeded their assets and were therefore insolvent as is required in terms of the Insolvency Act 24 of 1936. In the premises, the learned judges held that the findings of the high court cannot be faulted and that indeed it exercised its direction judicially and this Court was therefore not entitled to interfere with its discretion to refuse the granting of the provisional order.

The minority judgment would therefore have dismissed the appeal with costs.

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