CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 45/99

| | |
|---|---|
| PAULUS PHILLIPUS BRUMMER | Applicant |
| versus | |
| GORFIL BROTHERS INVESTMENTS (PTY) LTD | First Respondent |
| THE ESTATE OF THE LATE SOLLY GORFIL | Second Respondent |
| DAVID GORFIL | Third Respondent |
| NYLSTROOM HOTEL CC | Fourth Respondent |

Decided on : 30 March 2000

---

JUDGMENT

---

YACOOB J:

[1] We have before us a belated application for special leave to appeal and an application for condonation of the lateness. These applications are part of an attempt by the applicant to set aside the sale in execution of his right in certain pending proceedings which I describe later. This attempt began with the issue of a combined summons in the Transvaal High Court during May 1995 claiming that the sale should be set aside as an abuse of the court process and contrary to public policy. The High Court dismissed this claim on 28 March 1996[1] and refused leave to

---

[1] The judgment is reported as *Brummer v Gorfil Brothers Investments (Pty) Ltd en Andere 1997 (2) SA 411(T).*

appeal. The Supreme Court of Appeal granted leave, heard the appeal and dismissed it.[2] The majority in that court held that the sale in execution was not against public policy and should not be set aside. The applicant now wants to appeal to this Court. The applications in this Court were filed on 15 December 1999, more than nine months after the delivery of the judgment in the Supreme Court of Appeal.

---

2 The judgement is reported as *Brummer v Gorfil Brothers Investments (Pty) Ltd en Andere 1999 (3) SA 389 (SCA)*.

[2] The applicant's right that was sold relates to an action that he launched in 1987, claiming damages for the alleged repudiation of a contract he had entered into with the fourth respondent.[3] The third respondent and his father[4] were also joined.[5] In September 1991, at the close of the applicant's case, the trial judge absolved the third respondent and his father from the instance with costs, but refused absolution in respect of the fourth respondent. The costs payable by the applicant to the third respondent and his father pursuant to this order were taxed in the sum of R52 436-48. This amount remained unpaid and the third respondent and his father caused the applicant's right in the pending case to be attached and sold in execution. The first respondent bought the applicant's right at the sale in execution on 10 March 1993. The third respondent and his father were the sole shareholders and directors of the first respondent at the time of the sale.

[3] I now consider the application for condonation. It is first necessary to consider the circumstances in which this Court will grant applications for condonation for special leave to appeal. This Court has held that an application for leave to appeal will be granted if it is in the interests of justice to do so and that the existence of prospects of success, though an important consideration in deciding whether to grant leave to appeal, is not the only factor in the determination of the interests of justice.[6] It is appropriate that an application for condonation be considered on the same basis and that such an application should be granted if that is in the interests of justice and refused if it is not. The interests of justice must be determined by

---

3 The first defendant in the pending proceedings.

4 Who is deceased and whose deceased estate is second respondent.

5 The second and third defendants in the pending proceedings.

6 *Fraser v Naude* 1999 (1) SA 1 (CC); 1998 (11) BCLR 1357 (CC) at para 7.

reference to all relevant factors including the nature of the relief sought, the extent and cause of the delay, the nature and cause of any other defect in respect of which condonation is sought, the effect on the administration of justice, prejudice and the reasonableness of the applicant's explanation for the delay or defect.

[4] The main issue to be raised in the intended appeal broadly concerns the constitutionality of the laws that permit a party to pending legal proceedings or some other person to purchase the right of another in those proceedings for the sole purpose of terminating the litigation. The appropriate constitutional provision is section 34 of the Constitution which confers on everyone the right of access to courts. However, the sale in execution took place before either the interim Constitution[7] or the Constitution took effect. This Court held in *Du Plessis*[8] that the interim Constitution would ordinarily have no retrospective effect. It left open the question whether there might possibly be cases "where the enforcement of previously acquired rights would in the light of our present constitutional values be so grossly unjust and abhorrent that they cannot be countenanced".[9] It follows that the Constitution, too, cannot apply to such transactions in the absence of the extraordinary circumstances referred to in *Du Plessis*. To my mind, no such circumstances exist in this case and there can be no prospect of success in relation to the main

---

7 Act 200 of 1993, which came into operation on 27 April 1994.

8 *Du Plessis and Others v De Klerk and Another* 1996 (3) SA 850 (CC); 1996 (5) BCLR 658 (CC).

9 At para 20.

issue. I express no opinion on what the prospect would have been if the sale in execution had not taken place before the interim Constitution came into operation.

[5] This Court, like the Supreme Court of Appeal and the High Courts, has the power to "develop the common law, taking into account the interests of justice."[10] The applicant intends to ask this Court to exercise this power with retrospective effect in the course of the intended appeal.[11] I assume that this Court can exercise the discretion to develop the common law retrospectively in appropriate cases.

[6] If the common law is developed in the intended appeal in favour of the applicant and if he, as a result, succeeds in procuring an order setting aside the sale in execution, he will acquire the right to continue the pending proceedings against the fourth respondent. The court has not heard any evidence in that case since it was postponed on 26 September 1991. It would not ordinarily be in the interests of justice for an applicant to be allowed to pursue his claim some nine years after it was last heard by a court, and the applicant advances no special reason why

---

10 Section 173 of the Constitution.

11 *Amod v Multilateral Motor Vehicle Accidents Fund 1998 (4) SA 753 (CC)*; *1998 (10) BCLR 1207 (CC)* at para 20.

this should be so in the present case. This conclusion is reinforced by the fact that the delay had not been occasioned by the respondents and that the applicant's conduct after the sale was less expeditious and efficient than was to be expected. I have mentioned that the sale in execution took place during March 1993. The applicant made no effort to stay the sale although he had received the writ of execution some four months earlier. The case for setting aside the sale in execution was started in May 1995, more than two years after the sale had taken place. The petition for leave to appeal to the Chief Justice was filed, out of time, on 20 November 1996, some three months after the application for leave to appeal against the judgment of the High Court was dismissed by that court. The application before us was filed only on the 15 December 1999, more than nine months after the delivery of the judgment of the Supreme Court of Appeal. The cumulative effect of all these factors drives me to the conclusion that it is not in the interests of justice for condonation to be granted and that it should be refused.

[7] The respondents ask for their costs if this application were to be refused. We do not accede to this request. This Court does not ordinarily make orders for costs in applications that are dealt with summarily on the basis of information contained in affidavits, without written or oral argument being called for. Nothing warrants a departure from this practice in the present case.

[8] The Order:

1. The application for condonation is dismissed.
2. There is no order as to costs.

Chaskalson P, Langa DP, Goldstone J, Kriegler J, Madala J, Mokgoro J, Ngcobo J, O'Regan J, Sachs J and Cameron AJ concur in the judgment of Yacoob J.

For the applicant: Lubbe & Roets.

For the respondents: Hofmeyr Herbstein Gihwala Cluver & Walker Inc.