THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

From: The Registrar, Supreme Court of Appeal

Date: 14 April 2023

Status: Immediate

The following summary is for the benefit of the media in the reporting of this case and does not form part of the judgments of the Supreme Court of Appeal

Liberty Group Limited v Moosa (126/2022) [2023] ZASCA 52 (14 April 2023)

Today the Supreme Court of Appeal (SCA) upheld an appeal by Liberty Group Limited (the appellant) with costs, including costs of the application for leave to appeal in both the SCA and the KwaZulu-Natal Division of the High Court, Pietermaritzburg (the high court) and the costs of two counsel. The SCA further set aside the order of the high court, replacing it with an order placing the estate of Mohammed Shaaz Moosa (the respondent) under provisional sequestration and calling upon the respondent to advance reasons, on a specified date, why the high court should not order the final sequestration of his estate.

The appeal was directed against an order of the high court which dismissed the application by the appellant for the provisional sequestration of the estate of the respondent. The high court thereafter also dismissed an application by the appellant for leave to appeal on the basis that its order is, in terms of s 150(5) of the Act, not appealable.

The issue before the SCA was whether an appeal against the refusal of a provisional order of sequestration is precluded by s 150(5) of the Insolvency Act 24 of 1936 (the Act).

On 16 September 2016, the appellant obtained judgment in the amount of R 883 024.43, plus interest and costs on the attorney and client scale against the respondent. The claim was based on a suretyship executed by the respondent in favour of the appellant for the liabilities of a close corporation, Shaazura Investments CC (Shaazura), which had been placed in voluntary liquidation on 13 March 2013. When the appellant failed to obtain satisfaction of the debt, it initiated an application in the high court in terms of rule 46A of the Uniform Rules of Court to have the two immovable properties that were registered in the respondent's name to be declared executable. The respondent opposed the application and whilst it was pending, he caused ownership of the two properties to pass to the Mubaraak Family Trust (the trust). Each transfer was 'black-booked' – a conveyancing term - meaning that the deeds registry was requested to expedite the transfer and registration of ownership. Consequently, transfer and registration of ownership in each instance occurred one week after lodgement of the prescribed documents with the deeds registry. The respondent was the founder of the trust and the three trustees were the respondent, Mr Mohamed Shuabe and a representative of a trust company. When Mr Muhammed Shuabe ceased to be a trustee, the respondent's mother was subsequently appointed in his place. The trust is a discretionary trust of which the respondent and his family members are the beneficiaries.

The respondent is also a director of three property-owning companies – Sultex Holdings (Pty) Ltd (Sultex), Mstu Investments (Pty) Ltd (Mstu) and Mazzri Investments (Pty) Ltd (Mazzri). Mstu owns an immovable property in Pietermaritzburg, which it purchased from the trust for R5,5 million. Sultex purchased two immovable properties in Pinetown for R35 million. Mazzri, of which the respondent is the sole director, is the owner of four immovable properties; two of which, held under one deed of transfer, were purchased from the trust for an amount of R2,7 million and the other two were purchased for R4 million and R3 million apiece. The respondent admitted that he is a director of Sultex, Mstu, and Mazzri, but stated that he is not a shareholder of any one of them.

The respondent further admitted that he is indebted to the appellant in the amount of R1 676 048.86. In his answering affidavit, he had described himself as being both factually and hopelessly insolvent, stating that he resisted the application due to the fact that if the provisional sequestration order was granted, there would be no advantage to his creditors. The appellant disagreed with this assertion and argued that all indications were that the respondent is indeed the driving force and directing mind of the trust and that what the respondent has effectively achieved is to put the properties beyond the reach of his creditors. The appellant further argued that the respondent proffered no plausible explanation as to why he surreptitiously caused the passing of ownership of the two properties and that that was something in regard to which an investigation and inquiry may yield a benefit to his creditors if it were found that the sale and transfer of those properties to the trust were improper dispositions as contemplated in ss 29, 30 and 31 of the Act. So too, investigations into the shareholding of Sultex, Mstu and Mazzri, all of whom own immovable properties of substantial value.

In coming to a decision, the SCA held that the respondent's answering affidavit in the application for sequestration in the high court raised more questions than answers and that he was obliged to be candid with the court and deal pertinently with the facts, particularly those that fall within his peculiar knowledge. It held that it was also incumbent on him to annex copies of relevant documentary evidence, to enable the court to ascertain whether his version survives scrutiny. And, to put up confirmatory affidavits from persons, including his mother, to whom he was allegedly indebted.

The SCA went further to state that advantage to creditors may lie in the prospect of finding assets falling into the insolvent estate, which may have been concealed or improperly disposed of. It will be sufficient if the creditor, on an overall view on the papers, can show, for example, that there are reasonable grounds for coming to the conclusion that upon investigation and inquiry a trustee may be able to unearth assets that might then be attached, sold and the proceeds disposed of for distribution amongst creditors.

In conclusion, the SCA found that the high court was far too receptive to the respondent's case and that a proper conspectus of the evidence ought to have led it to the conclusion that a provisional sequestration was, in the circumstances, not just appropriate, but indeed necessary.

In the result, the SCA found that the appellant's application should have succeeded before the high court.

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