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 March 2024**

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

Murray and Others NNO v Ntombela and Others (729/2022) [2024] ZASCA 24 (14 March 2024)

Today, the Supreme Court of Appeal (SCA) dismissed with costs an appeal from a judgment of the Free State Division of the High Court, Bloemfontein (the high court) against an order directing the appellants, who are joint liquidators of Phehla Umsebenzi Trading 48 CC (in liquidation) (Phehla Umsebenzi), to file a rule 53 record and provisionally setting aside their rule 6(5)*(d)*(iii) notice in terms of which they, in effect, asserted that the respondents' review application was ill-conceived. The two respondents, Mr Madala Louis David Ntombela and Mrs Sefora Hixsonia Ntombela (the respondents) who are married to each other in community of property purchased certain immovable property from Phehla Umsebenzi for R2 500 000 which they allegedly paid to the members of Phehla Umsebenzi before the property was transferred to them pursuant to the parties' agreement of sale.

On 6 June 2018 Phehla Umsebenzi was wound up pursuant to a resolution adopted by its members. The first to third appellants, Mr Cloete Murray, Mr Gert Louwrens Steyn De Wet and Ms Magda Wilma Kets were appointed as joint liquidators. There was a delay in effecting transfer of the property to the respondents (before Phehla Umsebenzi was wound up). Later, the appellants indicated that they were not going to transfer the property into the respondents' name. Rather, they would be selling it by way of auction to the highest bidder for the benefit of all the creditors of Phehla Umsebenzi.

This then prompted the respondents to apply to court for an interdict restraining the appellants from putting the property up for auction pending the outcome of legal proceedings to be instituted by them for an order, *inter alia*, reviewing the appellants' decision not to implement the sale agreement and also compelling the appellants to transfer the property to them pursuant to the sale agreement concluded with Phehla Umsebenzi before its liquidation.

In due course the respondents instituted the proceedings foreshadowed in their application for an interdict, reviewing the appellants' decision not to implement the sale agreement and also claiming transfer of the property to them. The appellants opposed the application on a number of grounds. The principal ground for opposing the review proceedings was that the relief sought by the respondents could not be granted in view of the seller's liquidation which had the effect that all the assets of Phehla Umsebenzi fell to be sold and the proceeds thereof distributed amongst the creditors of Phehla Umsebenzi in accordance with the ranking of their claims.

In countering the appellants' contentions, the respondents instituted an interlocutory application for an order declaring the appellants' rule 6(5)*(d)*(iii) notice in which the crux of their opposition was concisely articulated as constituting irregular proceedings and for an order compelling the appellants to file a rule 53 record evidencing the basis of their decision not to implement the sale agreement.

The high court ruled that the appellants' rule 6(5)*(d)*(iii) notice was premature and consequently it set it aside provisionally pending the filing of the rule 53 record sought by the respondents which had to be filed immediately before the merits of the review application itself could be adjudicated. The high court further held that what was before it for adjudication was the interlocutory application and that the appellants' quest to have the main application heard at that stage would be tantamount to putting the cart before the horse.

The high court proceeded to hold that in review proceedings the applicant is entitled as of right to the rule 53 record. And that the appellants' attempt to circumvent the rule had to fail. The high court subsequently granted the appellants leave to appeal to the SCA against its order.

On appeal, the SCA – by a majority of three members of the Bench – held that the high court was correct in deciding the dispute in the way it did and that the appeal therefore fell to be dismissed with costs.

The minority judgment – by two members of the Bench – held that the high court was wrong and that it should have entered into the merits of the rule 6(5)*(d)*(iii) notice filed by the appellants and determined the questions of law raised therein before all else. In the view of the minority, the appeal fell to be allowed with costs and the order of the high court set aside.

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