THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

Reportable

CASE NO: 319/04

In the matter between :

YUSUF OMAR ABOO Appellant

and

FIRSTRAND BANK LIMITED Respondent

Before:	**STREICHER, CAMERON, NAVSA, HEHER JJA & COMRIE AJA**
Heard:	**7 MARCH 2005**
Delivered:	**29 MARCH 2005**
Summary:	**Appeal against a full court judgment against an appellant who had no right to prosecute the appeal to the full court after his sequestration – application by trustee to be substituted for the appellant in the appeal to this court – substitution can serve no purpose as the appellant could not and the trustee cannot contend that the court *a quo* should have found in favour of the appellant.**

J U D G M E N T

STREICHER JA

STREICHER JA:

[1] The appellant was granted special leave to appeal to this court against a judgment of the full court of the Transvaal Provincial Division ('the court *a quo*'). Since the granting of such leave the appellant has died but for ease of reference I shall still refer to him as the appellant. After the granting of special leave it came to light that the appellant had been sequestrated before the court *a quo* heard the appeal. As a result the respondent now applies for the appeal to be dismissed. The trustee in the appellant's insolvent estate wants to oppose the application and applies to be substituted for the appellant.

[2] During August 1999 the appellant entered into an agreement ('the agreement') with the respondent in terms of which the appellant purchased from the respondent its claims against Kharbai Motors (Pty) Ltd (in liquidation) ('Kharbai Motors') and Mohammed Carrim Kharbai ('Kharbai') against whom a provisional sequestration order had been granted at the instance of the respondent. The respondent undertook to apply for the discharge of the provisional sequestration order against Kharbai upon payment of two instalments in respect of the purchase price; to cede to the appellant the claims as well as two bonds registered in favour of the respondent as security in respect of the claims, upon payment of the purchase price in full; and 'to close the enquiry into the affairs of Kharbai Motors under Section 415 of the Companies Act'.

[3] The appellant paid the full purchase price whereupon the respondent cancelled the mortgage bonds and sent the relevant title deeds to the appellant's attorneys. Approximately eight months later the appellant's attorneys, in a letter to the respondent's attorneys, stated that, in terms of the agreement, the respondent was obliged to cede its securities over the fixed properties to the appellant. They indicated, furthermore, that they would gladly receive a reply as to the reasons why the respondent had cancelled the mortgage bonds. The respondent's attorneys replied as follows:

'1. Thank you for your letter of the 11th October.

2. You have been aware that the bonds have been cancelled since March this year.

3. The bonds were cancelled with your client's full knowledge and consent in view of the fact that he had advised that the properties had been sold.'

[4] Shortly thereafter the appellant launched an application against the respondent in terms of which he purported to cancel the agreement and sought an order against the respondent for the payment of R550 000, being the purchase price paid in terms of the agreement, plus interest. He alleged that he never consented to the cancellation of the mortgage bonds and that he had not waived his rights in terms of the agreement, which provided as follows:

'No variation or amendment of, addition to, deletion from or consensual cancellation of this agreement or any of its terms or waiver of any term of this agreement or waiver of any right which may accrue to either party by virtue of this agreement or the waiver of any right which may accrue to either party by virtue of the breach or termination of this agreement shall be effective unless in writing and signed by the parties.'

[5] The respondent defended the matter and alleged that it had been agreed in writing that the mortgage bonds be cancelled. In this regard the respondent relied on several letters written by the appellant on the letterhead of Louis Trichardt Wholesalers and signed by the appellant above the words:

'FOR: LOUIS TRICHARDT WHOLESALERS

MR Y O ABOO.'

The respondent also relied on a note enclosing the deposit slip in respect of the appellant's payment of the costs in respect of the cancellation of the bonds, signed 'Mr Joe Aboo'. In his replying affidavit the appellant alleged that his signature on the correspondence purported to be on behalf of Louis Trichardt Wholesalers.

[6] The application came before De Jager AJ. He referred to the correspondence relied upon by the respondent; held that the agreement had been amended in writing signed by the parties or their authorized agents; and dismissed the application. On 11 November 2002 he granted the appellant leave to appeal to the court *a quo*.

[7] On 20 May 2003 a provisional sequestration order, which was made final on 17 June 2003, was granted against the appellant. The appellant nevertheless proceeded with the appeal without informing the court or the respondent that he had been sequestrated. The appeal was heard by the court *a quo* on 22 October 2003 and was dismissed on or about 9 February 2004. Bertelsman J dissented. He held that the appellant signed the letters on behalf of Louis Trichardt

Wholesalers, a company, and that the agreement had therefore not been amended in writing signed by the appellant, as required by the agreement.

[8] The appellant thereupon applied to this court for special leave to appeal, again without disclosing that he was an unrehabilitated insolvent. Leave to appeal was granted and the matter was eventually set down for hearing on 7 March 2005.

[9] On 3 December 2004 the respondent's attorneys wrote to the appellant's attorneys that it had come to their attention that the appellant had been sequestrated. They required the appellant's attorneys to state on what basis it was averred that they were entitled to proceed, firstly with the appeal to the court *a quo* and secondly with the application for leave to appeal and the appeal to this court. The appellant's attorneys replied that they had not been aware that the appellant had been sequestrated but that the appellant died on 3 November 2004 and that they had been instructed by the appellant's son, as executor in his estate, to proceed with the matter.

[10] Apparently the appellant's attorneys had second thoughts and on 14 February 2005 they wrote to the registrar of this court:

'Kindly note that the Appellant does not intend to proceed with this matter on the date allocated.

Please inform the Judges that they are not required to read the record.

The appellant will carefully consider its position.'

[11] This letter gave rise to an application by the respondent for the dismissal of the appeal with costs against any party opposing the application. The

application in turn gave rise to an application by the trustee in the insolvent estate of the appellant to be substituted for the appellant.

[12] In terms of s 20(1)(a) of the Insolvency Act 24 of 1936 the effect of the sequestration of the estate of an insolvent is to divest the insolvent of his estate, to vest it in a Master of the Supreme Court until a trustee is appointed and upon the appointment of a trustee to vest the estate in him. It follows that, after the sequestration of the appellant, the right that he acquired to appeal against the judgment of De Jager AJ no longer vested in him but vested first in the Master and upon the appointment of a trustee in his trustee. The appellant therefore had no right to proceed with the appeal to the court *a quo* and with a further appeal appeal to this court.

[13] The trustee states in his affidavit filed in support of the application to be substituted for the appellant, that he ratifies 'whatever steps had been taken by Mr Zehir Omar [the attorney who acted for the appellant] on behalf of the insolvent and consequently on behalf of the insolvent estate'. However, there is no evidence that any steps had been taken by Omar on behalf of the insolvent estate. According to Mr Omar, who appeared for the trustee before us, he was unaware of the fact that the appellant was insolvent. It must follow that he could never have intended to act on behalf of his insolvent estate. On the evidence before us, the appellant acted in his personal capacity and Omar represented him in that capacity. In these circumstances, assuming that the steps taken by the appellant could be ratified had he been acting on behalf of the insolvent estate, a

question that need not be decided, there can be no question of the appeal being salvaged by way of ratification (see *Caterers Ltd v Bell and Anders* 1915 AD 698 at 710).

[14] Before us Mr Omar relied heavily on *De Polo v Dreyer* 1991 (2) SA 164 (W). In that matter an insolvent instituted action for the payment of certain benefits to which his insolvent estate was entitled. The defendants filed a special plea in which they contended that the insolvent was not legally entitled to institute and/or proceed with the action. In his replication the insolvent alleged that his trustee had waived his right to be joined. The alleged waiver by the trustee was interpreted by the court as a refusal to institute action and an authorization to the insolvent to carry on with the action.[1] Morris AJ held that the insolvent could not sue for his own benefit but that the trustee's refusal to do so entitled him to sue for the benefit of the insolvent estate.[2] In the light of the fact that the refusal occurred after the action had been instituted, Morris AJ held that the insolvent's lack of *locus standi* had retroactively been remedied and dismissed the special plea on the basis that there would be an appropriate amendment of the particulars of claim and the citation of the insolvent.[3]

[15] The *De Polo* case is of no assistance to the trustee. In that case the court allowed the insolvent's lack of *locus standi* to be cured retrospectively but before judgment. Here a judgment has been given against the insolvent acting on his own behalf. We are dealing with an appeal against that judgment and an

[1] At 177F-G.
[2] At 179D-F.
[3] At 179F-J.

application by the trustee to be substituted for the appellant as appellant. The latter did not have the right to prosecute the appeal to the court *a quo* and could clearly not seek from this court an order, in substitution of the order granted by the court *a quo*, which he was not entitled to seek from that court. It is equally clear that the trustee, if substituted for the appellant, cannot contend that the appellant acting on his own behalf as he did, should have succeeded in the court *a quo*. It follows that a substitution of the trustee for the appellant can serve no purpose. The judgment, having been granted in the absence of the trustee and without notice to him, could not affect his rights adversely. Should he still wish to prosecute the appeal against the judgment of De Jager AJ his remedy is not to be substituted for the appellant in the appeal before us but to apply to the Transvaal Provincial Division for the setting aside of the judgment of the court *a quo* and to be substituted for the appellant. For these reasons the application by the trustee to be substituted for the appellant in the appeal before us must be dismissed.

[16] The respondent applies for the appeal itself to be dismissed. However, in the light of the fact that the appellant died and that his executor has not been substituted for him, an order binding the executor cannot be made. The appeal should, therefore, simply be struck from the roll.

[17] The following order is made:

1 The application for substitution, as appellant, of the trustee in the insolvent estate of the appellant, is dismissed with costs.

2 The appeal is struck from the roll.

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P E STREICHER
JUDGE OF APPEAL

CAMERON JA)
NAVSA JA)
HEHER JA) CONCUR
COMRIE AJA)