

REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

- (1) REPORTABLE: NO
- (2) OF INTEREST TO OTHER JUDGES: NO
- (3) REVISED: YES

CASE NO: 85785/2017

NKATEKO TREVOR MUKHAWANA

Applicant

(Identity Number [...])

and

IMRAN DINATH N.O

First Respondent

HELENA JEANETHA N.O

Second Respondent

BRAHAM VICTOR DAWSON N.O

Third Respondent

(In their capacities as the appointed provisional

trustees in the insolvent estate of **GERHARD**

JACQUES DU PLESSIS Masters-ref: T3317/17)

JUDGMENT (APPLICATION FOR LEAVE TO APPEAL)

SKIBI AJ

- [1] This is an application for leave to appeal against my judgement and order handed down on a March 2019, granting a final sequestration order. The applicant seeks leave to appeal either to the Supreme Court of Appeal

alternatively to the Full Court of this Division.

- [2] The grounds upon which the application for leave to appeal is founded, specifically the findings of fact/or rulings of law against which leave to appeal is sought are the following:
 - [2.1] *In the founding affidavit the respondents rely thereon that the insolvent and the applicant were accomplices in a fraudulent scheme to defraud the Madibeng Local Municipality ("the Municipality");*
 - [2.2] *The respondents further rely thereon that the funds syphoned to the applicant have to be restored to the insolvent estate for distribution to proven creditors of that estate in accordance with the provisions of the Insolvency Act, Act 24 of 1936 (the Insolvency Act) to provide redress to the principal creditors of the applicant which includes the insolvent estate;*
 - [2.3] *Further the respondents rely on transactions being impugnable (impeachable) in terms of section 26,29,30 and 31 of the Insolvency Act, 1936;*
 - [2.4] *The respondents submitted that approximately R11 million was received by the applicant;*
 - [2.5] *It is thereon that the respondents as in their founding affidavit argue that they are entitled to the alleged ill gained monies which were allegedly obtained by both the applicant and insolvent;*
 - [2.6] *When the respondents dealt with the statutory requirements for the compulsory sequestration of the applicant's estate in the founding affidavit they inter alia relied thereon that the transfer of funds from the insolvent to the applicant, constitutes impugnable transaction as contemplated in Insolvency Act and that the estate of the insolvent is entitled to recover these monies and as a result thereof the insolvent estate is a substantial creditor of the applicant;*
 - [2.7] *It is further relied on that the applicant is insolvent and that his propensity to liquidate assets constitutes a "discreet" deed of insolvency;*
 - [2.8] *In order for a final sequestration to be granted section 12 of the Insolvency Act determines that if at the hearing pursuant to the aforesaid rule nisi the Court is satisfied that:*

- [2.8.1] *the petitioning creditor has established the debtor a claim such as mentioned in sub section (1) of section 9; and*
- [2.8.2] *the debtor has committed an act of insolvency or is insolvency; and*
- [2.8.3] *there is reason to believe that it will be to the advantage of the creditor if the estate is sequestrated, it may sequester the estate of the debtor.*

[3] The applicant relies on six grounds for leave to appeal:

- [3.1] The contention by the applicant is that this court erred in relying on a supplementary affidavit when normally only three sets of affidavit filed in a matter and that the court should have regarded the supplementary affidavit as *pro non scripto*¹. In this ground the applicant argues that when I made a finding that the respondents have succeeded in proving acts of insolvency I relied on supplementary affidavit by the respondents as reflected in paragraph 33 of the judgment. instead I should have made a finding that no acts of insolvency were committed by the applicant in particular section 12 (1) (b) thereof has not been complied with by the respondents.
- [3.2] The applicant contends that this Court erred in its finding that funds constitute stolen money which was transferred from the insolvent's trust account to an entity known as *Mukhawana and Mukhawana Supply & Logistics (Pty) Ltd*. The Applicant's contention is that the stolen money does not belong to the insolvent and the insolvent has no claim against the applicant as contemplated in section 9(1) of the insolvency Act. In essence the applicant contends that the Court should have made a finding that the respondents are not creditors of the applicant as contemplated in section 9(1) of the Insolvency Act.
- [3.3] The applicant's further contention is that the respondents failed to demonstrate in the their founding affidavit that there is a reason to believe that the sequestration of the applicant will be to the advantage of the creditors of the applicant. This Court erred in sequestrating the estate of the applicant for allegedly participating in a fraudulent

¹ Standard Bank of South Africa v Swepersadh 2005(4) SA 148 (C) at 153H-154J; Hano Trading CC v

scheme and receiving stolen funds when the said stolen funds does not belong to the insolvent estate and the insolvent is not a creditor of the applicant.

- [3.4] The applicant further contends that the Court erred to make a finding that the respondents have demonstrated that the applicant has committed “discreet” deeds of insolvency as there is no provision in the Insolvency Act for “discreet” deed of insolvency to satisfy requirements of either section 8 or section 12 of the Insolvency Act.
- [3.5] It is further contended by the applicant that this Court erred in its finding and interpreting the provisions of section 20(9) of the new Companies Act 71 of 2008 that there is reason to pierce the corporate veil of the entity known as *Mukhawana and Mukhawana Supply and Logistics (Pty) Ltd* in order to sequester the applicant for monies received by his entity. In support of his argument the applicant contends that the court should have found, taking into consideration the *Law of Insolvency in South Africa*² that *Mukhawana & Mukhawana Supply Logistics (Pty) Ltd* is a separate legal entity unrelated to the applicant.
- [3.6] The applicant's contention on the last ground is that this Court erred in failing to take into consideration the authorities referred to herein.

- [4] The test whether to grant an application for leave to appeal is to be found in section 17 of the Superior Courts Act³:

"(1) leave to appeal may only be given where the Judge or Judges concerned are of the opinion that-

(a) (i) the appeal would have a reasonable prospects of success;

or

(ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;..."

- [5] I do not intend to deal with each and every ground of appeal In this application.
- [6] The effect of the final sequestration order granted against the applicant negatively affects his status as an individual separate from the legal entity, *Mukhawana and Mukhawana Supply and Logistics (Pty) Ltd* and he should be allowed to exercise his constitutional right of appeal. There **is a** reasonable possibility that another court may reach a different conclusion based on the law set out in MARS - *Law of Insolvency in South Africa*, 9th edition, 2008, Juta & Co (Pty) Ltd at page 113-114
- "the mere fact that the creditor alleges that the debtor had carried on his business under the name of a company and that his affairs had been inseparably intermingled to justify such a conclusion does not affect the legal position that the company is nevertheless a separate entity and not a mere alias of the debtor, and consequently a debt due by the company cannot be providing a ground for sequestration of his estate".*
- [7] There is also a reasonable possibility that the Court of Appeal might find that the court erred to invoke the provisions of section 20(9) of the new Companies Act 71 of 2008 when there was no formal application for the Court to make such an order.
- [8] After considering submissions of counsel on behalf of the applicant and the respondents as well as papers filed I am persuaded that the applicant has reasonable prospects of success on appeal.

Order

- [9] The following order is made:
- [9.1] The application for leave to appeal is granted to the Full Court of this Division.
- [9.2] Costs to be costs in the appeal

SKIBI AJ
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Heard on : 22 July 2019

Judgment delivered : 22 July 2019

APPEARANCES

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