IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL LOCAL DIVISION, DURBAN

Case No: D2296/2021

MICHAEL LAWRENCE STEWART N.O **FIRST APPLICANT**

PULENG FELICITY BODIDE N.O **SECOND APPLICANT**

JERIFANOS MASHAMBA N.O **THIRD APPLICANT**

(In their capacities as duly appointed joint liquidators
of Carmol Distributors (Pty) Limited in liquidation)

and

MAHOMED MUNAUF BALLIM **RESPONDENT**

(Identity No: 6[...])
(Date of Birth: 29 January 1961)

ORDER

The application for leave to appeal is dismissed with costs.

JUDGMENT

OLSEN J

[1] This is an application for leave to appeal against the order I made dismissing the application for the final sequestration of the estate of the Respondent, Mr MM Ballim, and setting aside the provisional order that had been made. As always, this judgment must be read together with my original judgment.

[2] Given the reasoning I followed in the original judgment, that because the Applicants failed to supplement their case, the decision of Lopes J is in fact the operative one (or one binding on me), the principal issue, and perhaps the only issue at this stage is whether the contention that my approach was wrong would have a reasonable prospect of success on appeal.

[3] I was referred in argument to the case of *BP Southern Africa (Pty) Ltd v Furstenburg* [1966] 1 All SA 583 (O) as support for the submission that s 12(2) deals *"*merely [with] a situation where the court expresses doubt as to whether there is satisfactory proof of the allegations before it*".* It is correct that in *Furstenburg* the judge spoke of the section being applicable *"*where it is doubtful whether there is satisfactory proof of the allegations alleged in the petition*"*. The context in which that was said was quite different to the present one. The subject being addressed was the issue as to the circumstances in which an applicant might conceivably ask for a postponement to put a petition in order. The court was not dealing with a dispute over the proper interpretation of s 12 (2) of the Insolvency Act. If it had been, the judge would no doubt have noted that the test for whether s 12(1) or 12(2) applies in an application for a final sequestration order turns on the question as to whether the court is satisfied, or not satisfied, that the requirements for the grant of the order are met. In some cases a sufficient level of doubt may lead the court not to be satisfied that the required case has been made out. In other cases the court would not be satisfied because it is convinced that the case has not been made out.

[4] There can be no doubt at all about what Lopes J found on the original papers put before him. He was not satisfied that a case had been made out for advantage to creditors. He made that clear by directing that if a supplementary affidavit was not delivered, the rule nisi was to be discharged on the extended return date. Clearly the judge was well aware of the fact that he had to guard against a breach of the immutable rule that if a case is placed before a Judge of first instance and a party is

dissatisfied with the decision, it has no right to have the same case for the same relief against the same party argued before another judge of first instance, in the hope that the result will be different. All the applicants had to do was convey to Lopes J that they were unable to supplement the material that had already been placed before him on the subject of advantage to creditors, which would have resulted in the order I ultimately made. They could then have applied for leave to appeal from Lopes J.

[5] Instead the applicants simply regurgitated what they had already said. And by those means sought to claim a right to reargue the merits of the original case before me, in the hope of different outcome.

[6] Counsel for the applicants argued for the first time that perhaps one should approach this matter upon the basis that what Lopes J had in mind was that the applicants should be allowed to re-introduce what had already been said in reply, upon the basis that the respondent would then have an opportunity to respond. That argument overlooks the words actually employed in the order. He allowed the applicants an opportunity to deliver a "supplementary" replying affidavit. A supplement adds something to that which it supplements. In this context the word "supplementary" conveys that the further replying affidavit was meant to cure a deficiency in what went before. That coincides with the words used in the statute. Section 12(2) allows the court to invite "further" proof.

[7] The rule that the applicant's case must be made in its founding papers, and its corollary that a new case cannot be made in reply, is not an absolute one, and is subject to the court's overriding discretion. (See *Shepherd v Mitchell Cotts Seafreight (SA) (Pty) Ltd* 1984 (3) SA 202 (T) at 205.) Where, as here, the respondent raises no objection and the court considers the new material only to reject it because it does not establish the case, there can be no objection to what was done. At the risk of repeating what I have said in the preceding paragraph, the judge asked for more proof in reply. He had clearly taken into account what had already been said in reply.

[8] Finally, on the issue of s 12(2) of the Act, I do not see that there is a compelling reason why the proposed appeal should be heard. The section has been

in operation since 1936. The so called *"*dearth of authority*"* on it is, I suggest, a product of the fact that the alternative course of action allowed by s 12(2) of the Insolvency Act is rarely employed. There may, in another case, be occasion to argue that there is a dearth of authority concerning the factors to be considered when the court exercises its discretion as to the course to be followed under s 12(2). But that does not arise in this case, for two reasons.

(a) Firstly, the respondent did not object to the decision of the court to give the applicants a second opportunity.

(b) Secondly, the applicants, in any event, had no "further proof" to provide; as a result of which the issue would be moot.

[9] To the extent that it is my duty to decide whether there is a reasonable prospect that an appeal based upon the proposition that Lopes J erred would be successful, my answer is in the negative. I repeat what I said in the main judgment on the subject, noting that nothing argued in the application for leave to appeal differed measurably from what was argued when the matter was first before me. I would merely add this. A final sequestration order changes the status of the debtor. It has always been recognised that it constitutes an invasion of the rights of the debtor. The grant of such an order against the will of the person concerned is justified when there is a countervailing benefit, in the form an advantage to the debtor's creditors. A debtor is entitled to resist the proposed change of status, which may endure for 10 years (or even longer in rare cases – see s127A of the Act), upon the basis that the justification for such an imposition, namely advantage to creditors, does not exist. Sequestration is not intended as a punitive measure. In cases where an applicant for a sequestration order maintains, as is done in this case, that there is a prospect of advantage to creditors emerging from an interrogation and the exercise of a trustee's powers, the bar cannot be set so low as to bring about that for all practical purposes a sequestration order is available merely for the asking.

[8] In my view, the facts required in order to justify a sequestration order are absent in this case. In my view, there is no reasonable prospect that an appeal court would take a different view on this issue, and grant the sequestration order.

[9] I make the following order:

The application for leave to appeal is dismissed with costs.

OLSEN J

Date of Hearing : 20 March 2024
Date of Judgment :

APPEARANCES

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