Reportable: ~~Yes~~ / No
Circulate to Judges: ~~Yes~~ / No

Circulate to Magistrates: ~~Yes~~ / No

IN THE HIGH COURT OF SOUTH AFRICA

(Northern Cape Division)

Case no: 448\04

Date heard: 2006-06-19
Date delivered: 2006-06-23

In the matter of:

JACOBUS HENDRIKUS JANSE VAN RENSBURG N.O. **1ST APPLICANT**
in his capacity as final trustee in the Insolvent Estate of
CORNELIUS JOHANNES BARNARD

NEVILLE CLOETE N.O. **2ND APPLICANT**
in his capacity as final trustee in the Insolvent Estate of
CORNELIUS JOHANNES BARNARD

ABRAHAM JOHANNES SWANEPOEL N.O. **3RD APPLICANT**
in his capacity as final trustee in the Insolvent Estate of
CORNELIUS JOHANNES BARNARD

versus

THE MASTER OF THE HIGH COURT,
KIMBERLEY NORTHERN CAPE DIVISION **1ST RESPONDENT**

MARTHINUS CHRISTOFFEL BARNARD N.O. **2ND RESPONDENT**
in his capacity as Executor in the deceased estate of
late MARIETJIE BARNARD (Master's ref.: 87/2001)

Coram: **MAJIEDT J** et **WILLIAMS J**

JUDGMENT ON APPLICATION FOR LEAVE TO APPEAL

MAJIEDT J:

1. The applicants seek leave to appeal against our judgment of 21 October 2005 in which their application for review was dismissed with costs. The application for leave to appeal was dismissed with costs on an *ex tempore* ruling – these are the reasons for the said order.

2. The grounds upon which leave to appeal is sought are the following:

   a) That we erred in our finding that factual disputes exist and that therefore the approach set forth in **Plascon Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984(3) SA 623 (A)** should be applied. More specifically it is said that we erred in not admitting as evidence the statements made by the insolvent on affidavit in his earlier sequestration application and in not attaching sufficient weight to the fact that the insolvent did not present an affidavit in the present proceedings in support of the second respondent's affidavit.

b) That we erred in finding that the insolvent, Mr. Barnard (snr), should have been joined as a party to these proceedings.
c) That we erred in finding the delay in bringing the review application to have been unreasonable and in particular in our finding that the provisions of section 111 of the Insolvency Act, No. 24 of 1936 ("*the Act*") apply instead of those contained in section 151 of the Act; also in

finding the delay to have been unreasonable in the absence of prejudice on the part of either of the respondents; also in finding the provisions of the Promotion of Administrative Justice Act, No. 3 of 2000 to be applicable to the proceedings and finding that it was necessary for the applicants to apply for condonation herein.

3.1 All the abovementioned matters have been dealt with fully in our judgment.

3.2 With regard to the inadmissibility in the present proceedings of the insolvent's evidence proffered by way of answering affidavit in his sequestration application, it is such settled law that it does not in my view require any further elucidation.

3.3 Furthermore, and in any event, the insolvent is not a party to these proceedings. As was alluded to in our judgment on the main application, the non-joinder of the insolvent and of the children of the insolvent and the deceased, may well be fatal to the applicants' application. We nevertheless regarded it as practical and in the interests of justice to proceed with the matter, notwithstanding this potential fatal defect in the applicants' case. Be that as it may, the reality of the situation is that the insolvent was not joined as a party to these proceedings. Consequently, whatever the insolvent had said in the sequestration application by way of affidavit, can never be admissible as evidence in these proceedings. The insolvent has a direct and material interest in these proceedings and I still fail to comprehend why he and the children of the insolvent and the deceased had not been joined as co-respondents in this matter.

3.4 There is accordingly in my view no merit at all in the contention that we had erred in not admitting as evidence the insolvent's statements on oath made in the sequestration application.

4. In the preceding paragraph I had dealt briefly with our finding that the insolvent should have been joined as a party to these proceedings. There can be no doubt that the insolvent was a central figure to these proceedings; after all, the applicants were attacking in essence his so-called "*repudiasie sertifikaat*". In

addition, this Court's finding on the issues before it would clearly have had a direct and material effect on the insolvent, i.e. as to whether he would become a beneficiary under his wife's will or not. Consequently I am similarly of the view on this aspect that there is no merit in the contention that we erred in this finding. In any event, as I have already alluded to hereinbefore, we had proceeded with the matter on the basis that the merits can be decided in the absence before us of the insolvent and the children of the insolvent and the deceased. In this regard we had afforded the applicants the benefit and had proceeded to adjudicate the matter on its merits.

5.1 With regard to the delay, the only submission which Mr. Daniels for the applicants has made before us, is that the respondents have not shown any prejudice in this regard. The prejudice which is at issue here is not only the prejudice to the respondents before the Court, but also to the broader general public. In this regard, Nugent JA put it thus in **Gqwetha v Transkei Development Corporation Ltd and others 2006(2) SA 603 (SCA) at 612 F (par 22):**

> "First, the failure to bring a review within a reasonable time may cause prejudice to the respondent. Secondly, **and in my view more importantly**, there is a public interest element in the finality of administrative decisions and the exercise of administrative functions." (emphasis supplied).

See also: **Associated Institutions Pension Fund and others v**

Van Zyl and others 2005(2) SA 302 (SCA) at 321.

5.2 In addition to the aforementioned, Nugent JA also emphasized that:

> "Underlying that latter aspect of the rationale is the inherent potential for prejudice, both to the efficient functioning of the public body and to those who rely upon its decisions, if the validity of its decisions remains uncertain. It is for that reason in particular that proof of actual prejudice to the respondent is not a precondition for refusing to entertain review proceedings by reason of undue delay, although the extent to which prejudice has been shown is a relevant consideration that might even be decisive where the delay has been relatively slight"

at 612 H – 613 A (par. 23).

6. Mr Danzfuss for the second respondent has correctly pointed out that, whereas the applicants placed reliance on the fact of settlement negotiations between the parties and on the need to have sought senior counsel's opinion to explain the delay, the facts of the matter militate against their explanation. In this regard he has alluded to the fact that settlement negotiations commenced only some three months after the 14 day-period set forth in section 111(2)(a) of the Act had expired. In addition thereto, this present review application was launched only some three months subsequent to the settlement negotiations having been terminated during January 2004. No explanation at all has been furnished by the applicants for the aforementioned delay.

7.1 Another insurmountable obstacle in the applicants' way on this issue of delay, is the fact that the applicants incorrectly approached the matter on the basis that section 151 of the Act is applicable here. We agreed with Mr. Danzfuss in our judgment on the main application and still do so herein, that in fact the provisions of section 111 of the Act apply here. The second respondent had lodged his objection to the Master from the outset in terms of the provisions contained in section 111 of the Act. Thereafter the Master, as he was in duty bound, afforded the applicants an opportunity to reply to the aforementioned objection. The applicants did in fact furnish a reply to the section 111 objection. Thereafter the Master made his ruling in terms of section 111(2).

7.2 The attorneys acting for the applicants mistakenly thereafter relied on section 151 of the Act. I am satisfied, as Mr. Danzfuss has submitted, that section 111 is the applicable section. In terms of the provisions contained in section 111(2)(a) of the Act, the applicants had to apply to a court to have the aforementioned decision of the Master set aside, which application should have been brought within 14 days from the date of the Master's instruction. If out of time, condonation for the lateness of such application should have been sought. In the present matter the application was launched some 14 months after the Master's decision. The explanations for the delay proffered in the applicants' replying affidavit are singularly unpersuasive for the reasons set forth in the preceding paragraph. In addition, the applicants could not be afforded the indulgence of senior counsel's opinion, thereby disregarding the clear provisions of the Act. For the reasons further set forth in our main judgment, I am of the view that we were correct in our finding that the application should indeed fail by reason of unreasonable delay.

8. Even if section 151 was applicable, as the applicants contend, it would mean that the provisions of the Promotion of Administrative Justice Act, 3 of 2000, become applicable (for the reasons propounded in par. 16 of the main judgment). In terms thereof, the applicants had to bring their application within 180 days (section 7(1) of the said Act). In **Hopkins Boerdery (Edms) Bpk v Colyn and another [2006] 1 All SA 497 (C)** the Court regarded a six month delay as unreasonable. Similarly in the **Gqwetha**-case *supra*, a 14-month delay was also regarded as unreasonable.

9. A further compounding problem for the applicants is that even if, as they contended, section 151 of the Act is applicable, it is required in law that they should first exhaust the internal remedies set up in the relevant legislation, before approaching this Court on review. Consequently they had to proceed in terms of section 111 of the Act, before approaching this Court on review.

See: Section 7(2) of the Promotion of Administrative Justice Act;

Nichol and another v Registrar of Pension Funds and others [2006] 1 All SA 589 (SCA) at 595 a-b.

Departure from this statutory prescript is only allowed in exceptional circumstances on application by the person concerned (section 7(2)(c) of the aforementioned Act). See: the **Nichol-case** *supra,* at 595 e-g (par 17-18). In the present matter no such grounds at all were advanced and no exceptional circumstances have been shown.

10. For the reasons set forth, I am of the view that there is no reasonable prospect that another Court may find differently on this matter.

11. There is another fundamental problem with the applicants' application for leave to appeal, which Mr. Danzfuss has pointed out in the course of his argument before us. Nowhere in their application for leave to appeal, do the applicants attack our finding that on the overwhelming probabilities before us, the insolvent had in fact repudiated the benefits under his wife's will. It is so that there is, in general, a ground advanced that this Court erred in dismissing the applicants' application. No specific grounds, are however, advanced as to why our main finding to the effect that the insolvent did in fact repudiate the benefits, is incorrect. On this particular aspect, for the reasons set forth in the judgment in the main review application herein, there is also no reasonable prospect of success at all on appeal.

12. Consequently we issued an order *ex tempore* that the application for leave to appeal be dismissed with costs.

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SA MAJIEDT
JUDGE

I concur:

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CC WILLIAMS
JUDGE

ADVOCATE FOR APPLICANTS : ADV AJ DANIELS
ADVOCATE FOR SECOND RESPONDENT : ADV FWA DANZFUSS SC

ATTORNEY FOR APPLICANTS: ELLIOT MARIS WILMANS & HAY
ATTORNEY FOR SECOND RESPONDENT : DUNCAN & ROTHMAN
