IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION
JOHANNESBURG

CASE NO: 33815/2021

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES : NO
(3) REVISED

SIGNATURE

DATE: 05/09/2022.....

In the application between:

REGIMENTS FUND MANAGERS (PTY) LTD **First Applicant**

LITHA MVELISO NYHONYHA **Second Applicant**

MAGANDHERAN PILLAY **Third Applicant**

and

THE COMMISSIONER FOR THE
SOUTH AFRICAN REVENUE SERVICE **First Respondent**

REGIMENTS CAPITAL (PTY) LTD (IN LIQUIDATION)
Second Respondent

JUDGMENT – LEAVE TO APPEAL

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VICTOR, J:

[1] This is an application for leave to appeal my judgment dated 21 February 2022 in terms which I granted an interim interdict. For convenience the parties will be referred to as cited in the main judgment.

[2] SARS appeals the judgment on a number of grounds. It submits that the applicants have no locus standi to bring the application and the Court erred in this regard because a taxpayer has no right to a hearing prior to the issue of an assessment. In addition, SARS submits that the applicants have no standing in their capacity as creditors or former directors of Regiments a company in liquidation. SARS also submits that the Court erred in relation to the derivative action in terms of section 165 of the Companies Act. SARS argues that the Court has no power to grant a temporary interdict against the exercise of a statutory power and the judgment amounts to a contravention of the separation of powers. SARS submits that in any event the applicants were granted a hearing before issuing the assessment. SARS also submits that the Court incorrectly assessed the balance of convenience in granting the interim interdict.

[3] SARS submits that novel issues of law are raised so there are compelling reasons to grant leave to appeal.

[4] The Liquidators of Regiments in liquidation, in general make common cause with SARS on the grounds of appeal. The Liquidators submit that the interim interdict has an immediate, substantial and final effect and therefore appealable. The further grounds of appeal are that the Court mischaracterised the obligations of the Liquidators, the objection process, granting the directors of a company in liquidation substantive rights, ignored the reasons for the additional assessments, finding the applicants could bring a derivative action and that the applicants have locus standi.

[5] The Liquidators also submit that the Court erred in respect of the requisites of an interim interdict.

[6] The applicants in addition to opposing the appeal have also sought an order that the Court issue a Rule Nisi calling on the Liquidators to explain why they concealed a material fact namely that Davis J issued an order in these proceedings on an issue which was material to the application which I adjudicated. The applicants seek an order de bonis propriis costs against the Liquidators in their personal capacity on the attorney client scale. The applicants also seek an order interdicting the Liquidators from charging any fees and that they be ordered to repay such fees as they may have already charged.

[7] SARS and the Liquidators have raised objections in terms of Rule 30(2)(b) to the application. The Liquidators obtained an order on an urgent basis before Davis J on 14 September 2021 to extend their powers and replaced certain prayers in the order they obtained before Teffo J on 5 October 2020 and this also resulted in inconsistencies between the two orders. The applicants submit that the application was an ex post facto attempt to cure the order obtained before Teffo J grated earlier. These two orders go to the heart of the Liquidators authority to litigate. In addition, the Davis J order was obtained in the face of an order granted by Vally J.

[8] In my view, the allegations by the applicants raise very serious issues being the misleading the Court. The interests of the proper administration of justice is at stake here. [1] The Liquidators have raised technical issues in response. SARS also opposes the relief sought by the applicants in this de bonis propriis application. In particular, SARS contends that this Court is functus officio in relation to the question of costs and cannot now determine a costs issue.

[1] *Pohlman v Van Schalkwyk* 2001 (1) SA 690 (E) 697 C-F

Evaluation

Appeal

[9] The Court granted an interim order prior to the hearing of review proceedings. The order is one that is not final in effect. Each one of the grounds appealed upon clearly can be adjudicated in the review application. The nature of the grounds of appeal are susceptible of alteration in the main application. The law is clear. If an interim interdict does not dispose of a substantial portion of the relief sought then leave to appeal should not be granted. Furthermore, the applicants correctly submit that the interim interdict has no bearing on the relief sought in the main application.

[10] Section 17(1) (c) of the Superior Courts Act provides that where the judgment does not dispose of all the issues in the case and will not lead to a just and prompt resolution of the real issues between the parties, then leave to appeal may not be granted. There are no compelling reasons why the appeal should be granted as the real and genuine issues will be adjudicated in the review application.

[11] Accordingly, the application for leave to appeal is dismissed with costs.

Costs de bonis propriis against the Liquidators

[12] On the question of the application for an order of costs de bonis propriis against the Liquidators in their personal capacity, the allegations are of a serious nature. The applicants submit that even at this leave to appeal stage the Liquidators continue to conceal the order granted by Davis J. No litigant may knowingly mislead the court on a matter which is material to an issue before the Court and which they are aware of. [2] In my view this alleged misleading of a Court raises a serious issue since it is a central issue on the powers of the Liquidators. This issue should be fully ventilated before a Court.

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[2] *Toto v Special Investigating Unit 2001 and Trakman NO v Livshitz 1995 (1) SA 282 (A) 288 D_G*

[13] Section 173 of the Constitution provides a Court with an inherent power to protect and regulate its own process. In the face of the allegations made whether found to be proved or not, it will be in the interest of justice that this alleged misleading issue be considered by a court. I do not grant the Liquidators relief sought in terms of Rule 30 (2) (b). SARS has also lodged an objection in terms of Rule 30(2)(b) as the applicants seek to file new affidavits and introduce a new cause of action in relation to the Liquidators in their personal capacities. SARS submits this Court is functus officio.

[14] In my view it is in the interests of justice that another Court must determine the issue. In order to protect, regulate and uphold the proper administration of justice I have the inherent power and it is within my remit to allow this issue to be traversed. The applications in terms of Rule 30 (2) by SARS and the Liquidators are dismissed. The costs in this regard are reserved for the court adjudicating this issue.

[15] It is impractical to issue a Rule Nisi as the return date cannot be determined at this stage. It may well be that the application should serve before the Court hearing the review application. Consequently, SARS and the Liquidators shall file answering affidavits in response to the relief sought in the applicants 'Notice of Motion and Founding Affidavit within one month of this order. The applicants shall reply within 10 days of receipt of the affidavits.

The following order is made:

1. The application for leave to appeal is dismissed with costs.

2. The application to proceed with the relief as set out in their Notice of Motion regarding costs de bonis propriis against the Liquidators in their personal capacity is granted.

3. SARS and the Liquidators shall file their answering affidavits if any within one month of this order. The applicants shall reply within 10 days.

4. The costs of the costs de bonis propriis application is reserved.

5. The parties shall seek direction from the Deputy Judge President of this Division for the setting down of the hearing regarding the costs de bonis propriis application.

VICTOR, J

Judge of the High Court
Gauteng Local Division

Hearing Date: 10 May 2022
Date of Judgment: 05 September 2022

Counsel for the Applicants: Adv AE Bham SC
Adv T Scott
Instructed by: Smith Sewgoolam Inc

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Adv Lamplough
Adv N Komar
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Adv C Naude
Adv JL Verwey
Instructed by: Tintingers Inc