CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 33/03

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| PETER SIEGWART WALLACH | Applicant |
| versus | |
| THE REGISTRAR OF DEEDS (PRETORIA) | First Respondent |
| THE MASTER OF THE HIGH COURT | Second Respondent |
| MERVYN ISRAEL SWARTZ | Third Respondent |
| MICHAEL LEO DE VILLIERS | Fourth Respondent |

and

Case CCT 45/03

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| PETER SIEGWART WALLACH | Applicant |
| versus | |
| BRIAN SPILG | First Respondent |
| MERVYN ISRAEL SWARTZ | Second Respondent |
| MICHAEL LEO DE VILLIERS | Third Respondent |
| THE MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT | Fourth Respondent |
| THE SOCIETY OF ADVOCATES OF SOUTH AFRICA (WITWATERSRAND DIVISION) | Fifth Respondent |

Decided on : 14 November 2003

JUDGMENT

THE COURT:

[1] It is appropriate to deal with these two applications, CCT 33/03 (the first application) and CCT 45/03 (the second application), in one judgment.

[2] In both cases the applicant, Mr Peter Siegwart Wallach, represents himself. The first application is one for direct access under Rule 17[1] of the rules of this Court. First

1 Rule 17 of the Rules of the Constitutional Court provides:

> "Direct access in the interests of justice
> (1) An application for direct access as contemplated in section 167(6)(a) of the Constitution shall be brought on notice of motion which shall be supported by an affidavit which shall set forth the facts upon which the applicant relies for relief.
> (2) An application in terms of subrule (1) shall be lodged with the registrar and served on all parties with a direct or substantial interest in the relief claimed and shall set out –
>  (a) the grounds on which it is contended that it is in the interests of justice that an order for direct access be granted;
>  (b) the nature of the relief sought and the grounds upon which such relief is based;
>  (c) whether the matter can be dealt with by the Court without the hearing of oral evidence and, if it cannot,
>  (d) how such evidence should be adduced and conflicts of fact resolved.
> (3) Any person or party wishing to oppose the application shall, within 10 days after the lodging of such application, notify the applicant and the registrar in writing of his or her intention to oppose.
> (4) After such notice of intention to oppose has been received by the registrar or where the time for the lodging of such notice has expired, the matter shall be disposed of in accordance with directions given by the President, which may include –
>  (a) a direction calling upon the respondents to make written submissions to the Court within a specified time as to whether or not direct access should be granted; or
>  (b) a direction indicating that no written submissions or affidavits need be filed.
> (5) Applications for direct access may be dealt with summarily, without hearing oral or written argument other than that contained in the application itself: Provided that where the respondent has indicated his or her intention to oppose in terms of subrule (3), an application for direct access shall be granted only after the provisions of subrule (4)(a) have been complied with."

respondent is the Registrar of Deeds (Pretoria) (the Registrar), second respondent is the Master of the High Court (the Master), and the third and fourth respondents are the trustees in the former sequestrated estate of the applicant (the trustees).

[3] The second application is also one for direct access to this Court. First respondent is cited as being a senior advocate practising at the Johannesburg Bar; second and third respondents are the trustees; fourth respondent is the Minister of Justice and Constitutional Development; and the fifth respondent is The Society of Advocates of South Africa (Wiwatersrand Division). Both applications are opposed by the trustees. They will, however, be dealt with summarily under rule 17(5).[2]

[4] Briefly, the facts are as follows. The estate of the applicant was sequestrated on 5 October 1990. Ten years later, on 5 October 2000, he was rehabilitated by the effluxion of time in terms of section 127A[3] of the Insolvency Act 24 of 1936 (the Insolvency Act). Prior to the sequestration of his estate, the applicant was the registered owner of certain immovable property (the immovable property), a farm on

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2 Id. It should be noted, however, that rule 17(4)(a) affidavits were called for by the Chief Justice in the directions.

3 Section 127A provides as follows:

> "(1) Any insolvent not rehabilitated by the court within a period of ten years from the date of sequestration of his estate, shall be deemed to be rehabilitated after the expiry of that period unless a court upon application by an interested person after notice to the insolvent orders otherwise prior to the expiration of the said period of ten years.
> (2) If a court issues an order contemplated in subsection (1), the registrar shall transmit a copy of the order to every officer charged with the registration of title to any immovable property in the Republic.
> (3) Upon receipt of the order by such officer he shall enter a caveat against the transfer of all immovable property or the cancellation or cession of any bond registered in the name of or belonging to the insolvent.
> (4) The caveat shall remain in force until the date upon which the insolvent is rehabilitated."

which he now resides. Upon his rehabilitation, the immovable property remained unrealised and was still registered in his name. No caveat had been entered against it. Subsequently, however, the Master and the trustees caused an interdict caveat to be entered by the Registrar against the property, in terms of the provisions of section 18B of the Insolvency Act.[4] In May 2002, the applicant brought an application before Claassen J in the Johannesburg High Court (the High Court) for an order removing the above caveat noted against his immovable property. Claassen J dismissed his application with costs on 26 September 2002.[5]

[5] Earlier this year, the applicant applied for direct access to this Court. He contended that the order of the High Court dismissing the above application in effect violated his right to property under section 25(1) of the Constitution and unlawfully exposed him to the application of the Insolvency Act, thereby violating his right to the equal protection of the law under section 9(1) of the Constitution.

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4 Section 18B provides as follows:

> "(1) A trustee may, before or after the rehabilitation of an insolvent, with the written consent of the Master, by notice to the officer charged with the registration of title to immovable property in the Republic, in respect of immovable property or a bond registered in the name of the insolvent or of his spouse contemplated in section 21 (13), cause a caveat to be entered against the transfer of the immovable property or the cancellation or cession of the bond referred to in the notice.
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> (2) The notice referred to in subsection (1) shall be accompanied by the written consent of the Master contemplated in that subsection and shall identify sufficiently the person in respect of whom and the property or bond in respect of which the caveat is to be entered so as to enable the officer charged with the registration to enter the caveat as contemplated in the said subsection.
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> (3) The caveat shall remain in force until the date indicated by the Master in his consent."

5 *Wallach v Registrar of Deeds, Pretoria and Others* unreported judgment of the Johannesburg High Court, case no 8855/02.

[6] This application (*Wallach (1))* was dealt with summarily by this Court and dismissed[6] on the ground that it was not in the interests of justice to grant it.[7] The Court did so for, amongst others, the following reasons:

(a) "When the correctness of a judgment is challenged, the remedy is to lodge an appeal and not to apply to declare the judgment a nullity. The appeal must then be pursued through the normal process of an application to the High Court for leave to appeal. As appears from his affidavit, the applicant apparently had lodged such an application in the High Court, but suspended it when he launched this application for direct access. It is our view that it was inappropriate to have launched an application for direct access at this stage."

(b) "Even if we were to deal with this application as an application for leave to appeal directly to this Court against the order of the High Court under Rule 18 of the Rules of this Court, the application is defective: the applicant has not applied for a Rule 18 certificate as required and there is no explanation for that failure."

(c) "Moreover, the issue before this Court concerns the proper interpretation and application of provisions of the Insolvency Act, a matter which should be considered in the first instance by the Supreme Court of Appeal. Even if the applicant had followed the correct procedure to bring this application, the issues concerned do not make it an appropriate matter for a direct appeal to this Court."[8] (Footnotes in the text omitted).

[7] While *Wallach (1)* was still pending before this Court, the applicant applied to the High Court for leave to appeal against its above judgment, which application was dismissed on 3 February 2003. A subsequent application for leave to appeal to the

6 In *Wallach v The High Court of South Africa, Witwatersrand Local Division and Others* 2003 (5) SA 273 (CC).

7 Id para 8.

8 Id paras 5-7.

Supreme Court of Appeal ( the SCA) was summarily dismissed on 4 June 2003.

*The first application*

[8] The first application, lodged on 22 August 2003, is in part concerned, once again, with the correctness of the order of Claassen J in the High Court and the applicant seeks its review on the basis that his property rights under section 25(1) of the Constitution have been infringed - one of the grounds raised in *Wallach (1)*.

[9] In the first application the applicant, although formulating no substantive relief in his notice of motion, seeks the following in his founding affidavit:

> ". . . [a] direct access to this Honourable Court to set aside the orders of Claassen J given on 26 September 2002 and Spilg AJ given on 8 February 2002 on the grounds that such orders infringe my rights in terms of section 25(1) of the Constitution by invoking provisions of the Insolvency Act to arbitrarily deprive me of the property after 5 October 2000;
> and/or,
> [b] for an order declaring unconstitutional and invalid sections 25(1) proviso, 129(3)(c) and 18B of the Insolvency Act to the extent that such sections purport to deprive a person arbitrarily of immoveable property registered in his/her name upon the expiration of a period of ten years from the date of sequestration of the estate concerned after rehabilitation by the effluxion of time has occurred."

[10] In regard to the first ground of relief[9] the applicant, despite this Court's reasons for rejecting the application in *Wallach (1)* quoted in para 6(a) and (b) above, persists in once again bringing an application for direct access to this Court on the identical

9 Marked "[a]" and quoted in para 9 above.

issue. There are limits to the indulgence that a court can show to a lay litigant. The limits have clearly been exceeded in the first application. There is no other reasonable conclusion but that the applicant has deliberately chosen to ignore the Court's judgment in *Wallach (1)*. This is not a matter for direct access but one for appeal. Even if it were treated as an application for leave to appeal, the applicant has ignored the rules relating to such an appeal.

[11] He has also proffered no satisfactory explanation for the delay in bringing these proceedings, having regard to the fact that Claassen J dismissed his application for leave to appeal on 3 February 2003 and the SCA on 4 June 2003. The applicant does state that he only learnt of the latter fact on 20 August 2003, but does not take this Court into his confidence as to any steps taken by him to have the outcome of his application to the SCA brought to his attention or any enquiries made by him in this regard.

[12] The applicant also fails to make out any case in respect of the second ground.[10] Given the history of this matter, it is not appropriate for the applicant to raise, at this late stage, the constitutional invalidity of certain provisions of the Insolvency Act. This is particularly the case when regard is had to the fact that in *Wallach (1)* the applicant did rely upon the Constitution's property clause and claimed that he had been denied the equal protection of the law under section 9(1) of the Constitution.

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10 Marked "[b]" and quoted in paragraph 9 above.

The applicant was alive to and relied on his constitutional rights at the time of *Wallach (1)*. A litigant cannot, under these circumstances, be permitted to raise sequentially, and in separate legal proceedings, different constitutional challenges. There are certainly no exceptional circumstances in this case that would warrant this. Moreover, the applicant has not shown that his constitutional challenge to the affected provisions of the Insolvency Act carries any prospects of success. Even if it did, prospects of success would not necessarily be decisive in determining what is in the interests of justice.[11] There comes a time when finality must be reached in litigation. That time has been reached.

[13] Under these circumstances it is not in the interests of justice to grant direct access in the first application in order to have the judgment and order of Claassen J set aside, nor to attack the constitutional validity of the provisions of the Insolvency Act referred to.

[14] In the first application the applicant also seeks, by way of direct access, to set aside another High Court order, namely an order granted on 8 February 2002 by Spilg AJ - the first respondent in the second application - ejecting the applicant and his mother from the immoveable property (the ejectment order). The applicant contends that this order was made in his absence, but he does not say whether or not he had received notice that such an order was being sought on 8 February 2002. According

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11 *Fraser v Naude and Others* 1998 (11) BCLR 1357 (CC); 1999 (1) SA 1(CC) at para 7.

to the applicant, the order only came to his attention on 20 June 2002. He further states that he filed a "preliminary" application for leave to appeal against the ejectment order on 7 October 2002. No relevant explanation is furnished for this delay. The application for leave to appeal was dismissed on 4 July 2003. The applicant says that he had received no notice of the set-down and that the dismissal of his application only came to his notice on 19 August 2003.

[15] The observations made and conclusions reached in paragraph 10 above, apply with equal force to the setting aside of the ejectment order. There is also no explanation for the delay in bringing the "preliminary" leave to appeal application in the High Court. In considering the interests of justice in direct access applications, the likelihood of there being conflicts of fact which cannot be resolved without hearing *viva voce* evidence is relevant, for this Court should not act as a court of first and last instance, nor in normal circumstances as a trier of fact in the first instance.[12]

[16] In the present case there are material disputes of fact. In their opposing affidavits the trustees deny that the applicant was unaware that the application for his ejectment would be heard on 8 February 2002. They state that on 6 February 2002, when the application by the applicant and his mother, Mrs RME Wallach (Mrs Wallach) – for the recusal of the entire bench of the High Court in Johannesburg – was dismissed, Spilg AJ specifically informed applicant and Mrs Wallach that the ejectment application would proceed on 8 February 2002. On this version, the absence of the

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12 *Bruce and Another v Fleecytex Johannesburg CC and Others* 1998 (4) BCLR 415 (CC); 1998 (2) SA 1143 (CC); paras 7-8.

applicant and Mrs Wallach in Court on the latter date, if indeed they were absent, was the result of a deliberate decision on their part.

[17] The unavoidable conclusion reached, is that it is not in the interests of justice for this Court to consider the applicant's attack on the ejectment order.

*The second application*

[18] The second application is also one for direct access to this Court and was lodged on 18 September 2003. This application relates to the judgment and order of Claassen J referred to in paragraph 4 above. For the sake of convenience the facts will be restated briefly. On 8 February 2002 the first respondent, while serving as an acting judge on the High Court, granted an order ejecting the applicant from the immovable property. The applicant says that this order was given in his absence and that it only came to his notice on 20 June 2002. He does not say whether or not he had knowledge that an application for such an order would be heard on the day in question. As set out above, the trustees contend that he did have such knowledge. On 2 October 2002 the applicant filed a "preliminary" application for leave to appeal against the ejectment order. Unbeknown to him, so the applicant contends, the "preliminary" application for leave to appeal was enrolled for hearing on 4 July 2003 and dismissed in his absence.

[19] In this regard the trustees produced two letters written by the registrar of the

Acting Deputy Judge President in Johannesburg, bearing on this issue. Both appear to have been sent by registered post to an address which, according to the trustees, is the only address at which the applicant and Mrs Wallach are prepared to receive documents. In fact it is the same address given by the applicant in the present case in this Court for the service of documents. The one letter, dated 20 June 2003, is addressed to the applicant and informs him that Spilg AJ (the first respondent) will hear the application for leave to appeal on Friday 4 July 2003. The other letter, dated 7 July 2003, is addressed to Mrs Wallach and informs her that the applicant's application for leave to appeal will be heard on 15 July 2003. Once again there are serious conflicts of fact.

[20] On 26 August 2003 the trustees proceeded to execute the ejectment order. On the same day the applicant brought an urgent application in the High Court and Blieden J granted an order which, amongst other things –

(a) interdicted the respondents in question, pending the final determination of the application, from proceeding further with the ejectment order;

(b) entitled the applicant and his mother to re-enter the immovable property; and

(c) postponed the matter to the opposed roll of 30 September 2003, placing the parties on terms regarding the filing of affidavits.

[21] On 28 August 2003 the trustees abandoned the order of 4 July 2003 that had dismissed the "preliminary" application for leave to appeal. Before doing so the

trustees' attorney, according to the applicant, made a "private arrangement," without his knowledge, with the first respondent to re-hear the preliminary application for leave to appeal on 5 September 2003. In their answering affidavits filed in the first application, the trustees in effect deny this, stating that the applicant and Mrs Wallach were aware that their applications for leave to appeal had been set down for 5 September 2003. They state that the very reason the applications were set down on that date was because both the applicant and Mrs Wallach had contended that they had not received notice of the dates on which their applications had been set down previously. According to the trustees, the failure of the applicant and Mrs Wallach to attend the hearing on 5 September 2003 was "contemptuous". The applicant's main complaint in this regard is that the first respondent, in making the alleged private arrangement and in dismissing the application on 5 September 2003, violated his oath of office and infringed the applicant's right to access to the courts under section 34 of the Constitution.

[22] The second application does not appear to have been served on any of the respondents.

[23] Here too the applicant, instead of pursuing his appeal remedies, has come by way of direct access, squarely in the face of the law as laid down in *Wallach (1)*. Even if treated as an application for leave to appeal, the correct procedural steps have not been taken. In this application too, there are serious conflicts of fact, as indicated above.

[24] The applicant and his mother should not be seen as naïve or ignorant when it comes to litigation. The trustees furnish chapter and verse in this regard, and say that the applicant and his mother have, since 1991, been involved in litigation with the trustees directly or indirectly in more than thirty cases. Throughout they have acted in concert. With one exception, when Blieden J granted certain interim relief to the applicant, all these cases have either been abandoned by the applicant and Mrs Wallach or have been decided adversely to them.

[25] For all these reasons it is not in the interests of justice to grant direct access to the applicant. The effect of this judgment and the order to be made is that the judgment of Claassen J, referred to in paragraph 4 above, has become final and is not subject to any further attack by the applicant.

*Order*

[26] The following orders are made:

1. The application in case CCT 33/03 is dismissed with costs.
2. The application in case CCT 45/03 is dismissed with costs.

By the Court: Chaskalson CJ, Langa DCJ, Ackermann J, Madala J, Mokgoro J, Moseneke J, Ngcobo J, O'Regan J, Sachs J and Yacoob J.