

CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 2/03

PETER SIEGWART WALLACH

Applicant

versus

THE HIGH COURT OF SOUTH AFRICA
(Witwatersrand Local Division)

First Respondent

THE REGISTRAR OF DEEDS (Pretoria)

Second Respondent

THE MINISTER OF JUSTICE
AND CONSTITUTIONAL DEVELOPMENT

Third Respondent

Decided on : 04 April 2003

SUMMARY JUDGMENT

THE COURT:

[1] This application is for direct access under Rule 17¹ of the rules of this Court. It is brought by Mr Peter Siegwart Wallach (the applicant), litigating on his own behalf.

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;

He also applies for condonation for the late filing of this application. None of the respondents oppose either application. The application for condonation sets out the reasons for the delay in making this application. We consider it appropriate to condone the late filing of the application although the reasons for the delay are not wholly satisfactory. It is not in the interests of justice to be overly technical in this case, more particularly because the applicant is not represented. In addition, as will appear from the order in relation to the application, no one is prejudiced by this application.

[2] 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 127A² of the Insolvency Act 24 of 1936 (the

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- (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 a 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.”

² 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.

Insolvency Act). Prior to the sequestration of his estate, the applicant was the registered owner of certain immovable property, a farm on which he now resides. Upon his rehabilitation, the immovable property remained unrealised and was still registered in his name. No caveat had been noted against it. Subsequently, however, the Master of the High Court and the former trustees of the insolvent estate caused a caveat to be noted by the Registrar of Deeds against the property, in terms of the provisions of section 18B of the Insolvency Act. In May 2002, the applicant initiated motion proceedings before Claasen J in the Witwatersrand Local Division of the High Court, in which he demanded that the caveat noted against his immovable property be removed. Claasen J dismissed his application with costs.³

[3] After considering the application, we formed a clear view that it was not in the interests of justice for the application to be granted and that it should therefore be dealt with summarily in terms of Rule 17(5)⁴ of the rules of this Court. Taking into account that applicant is litigating on his own behalf, we consider it appropriate to briefly set out the reasons for our decision.

(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.”

³ *Wallach v Registrar of Deeds, Pretoria and Others* unreported judgment of the WLD, case no 8855/02, at page 12 lines 10-15

⁴ See note 1 above.

[4] The application proceeds on the basis that the order of the High Court dismissing the application effectively violates the applicant's right to property under section 25(1) of the Constitution and unlawfully exposes him to the application of the Insolvency Act, thereby violating his right to the equal protection of the law in terms of section 9(1) of the Constitution.

[5] In his notice of motion, citing the High Court as a respondent, the applicant applies for an order “[d]eclaring the judgment made by the ... High Court ... unconstitutional and invalid” thereby seeking to nullify that judgment. The application is misconceived. 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.⁵ 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.

[6] 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

⁵ Section 20(1) of the Supreme Court Act 59 of 1959 provides:

“(1) An appeal from a judgment or order of the court of a provincial or local division in any civil proceedings or against any judgment or order of such a court given on appeal shall be heard by the appellate division or a full court, as the case may be.”

Appeals in terms of this section must be pursued in terms of the provisions of Rule 49 and 49A of the Uniform Rules of Court promulgated in terms of section 43 of the Supreme Court Act.

rules of this Court,⁶ the application is defective: the applicant has not applied for a Rule 18 certificate as required and there is no explanation for that failure. Whereas in the High Court proceedings, the trustees of the insolvent estate and the Master of the High Court who opposed his application had been cited as respondents, applicant fails to join them as respondents in these proceedings. As appears from the notice of motion, papers had been served on the attorneys of the trustees of the insolvent estate and on the Master of the High Court. But that does not make them parties to these proceedings. They have a direct and substantial interest in the relief sought by the applicant and in the outcome of this matter. It is therefore required that they be properly cited as respondents in the application.

[7] Moreover, the issue before this Court concerns the proper interpretation and application of provisions of the Insolvency Act,⁷ a matter which should be considered in the first instance by the Supreme Court of Appeal. Even if the applicant had

⁶ The relevant provisions of Rule 18 of the Constitutional Court Rules provide as follows:

“Appeals from courts other than the Supreme Court of Appeal

(1) The procedure set out in this rule shall be followed in an application for leave to appeal directly to the Constitutional Court where a decision on a constitutional matter, other than an order of constitutional invalidity under section 172(2)(a) of the Constitution, has been given by any court other than the Supreme Court of appeal irrespective of whether the Chief Justice has refused leave or special leave to appeal.

(2) A litigant who is aggrieved by the decision of a court and who wishes to appeal against it directly to the Court shall, within 15 days of the order against which the appeal is sought to be brought and after giving notice to the other party or parties concerned, apply to the court which gave the decision to certify that it is in the interests of justice for the matter to be brought directly to the Constitutional Court and that there is reason to believe that the Court may give leave to the appellant to note an appeal against the decision on such matter.

⁷ 24 of 1936.

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] For the reasons stated here, it is not in the interests of justice for the application to be granted.

[9] The following order is made:

- (i) The application for condonation is granted;
- (ii) The application for direct access, alternatively for leave to appeal, is dismissed.
- (iii) There is no order as to costs.

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