CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 187/13

In the matter between:

MARTHINUS DAVID DE KLERK Applicant

and

GRIEKWALAND WES KORPORATIEF BPK Respondent

Neutral citation: *De Klerk v Griekwaland Wes Korporatief Bpk* [2014] ZACC 20

Coram: Mogoeng CJ, Moseneke DCJ, Cameron J, Froneman J, Jafta J, Khampepe J, Madlanga J, Majiedt AJ, Van der Westhuizen J and Zondo J

Heard on: 13 May 2014

Decided on: 19 June 2014

Summary: Section 8(g) of the Insolvency Act 24 of 1936 — section 86 of the National Credit Act 34 of 2005 — debtor applying for debt review — purported debt-restructuring proposal as act of insolvency — creditor granted sequestration order by lower court

Leave to appeal — Court reluctant to determine factual issues — lower courts concluded debtor is factually insolvent — factual insolvency is an independent basis for sequestration — debtor lacks prospects of success

Leave to appeal — not in the interests of justice to determine issue that may be covered by statutory amendment

ORDER

On appeal from the Full Court of the Northern Cape High Court, Kimberley (hearing an appeal from Williams J):

1. The application to amend the respondent's citation is granted.

2. Leave to appeal is refused.

3. The applicant is ordered to pay the respondent's costs in this Court.

JUDGMENT

VAN DER WESTHUIZEN J (Mogoeng CJ, Moseneke DCJ, Cameron J, Froneman J, Jafta J, Khampepe J, Madlanga J, Majiedt AJ and Zondo J concurring):

Introduction

[1] This is an application for leave to appeal against a final sequestration order granted by the Northern Cape High Court in Kimberley which was upheld on appeal by the Full Court of that Division. The application concerns whether a purported debt-restructuring proposal, in terms of section 86(1) of the National Credit Act,[1] sent to a creditor on the authority of a debtor, is an act of insolvency in terms of

[1] 34 of 2005. Section 86(1) provides:

> "A consumer may apply to a debt counsellor in the prescribed manner and form to have the consumer declared over-indebted."

section 8(g) of the Insolvency Act[2] and thus allows a creditor to initiate sequestration proceedings. It also poses questions about the interests of justice and whether this Court should interfere with the factual findings of a lower court.

Factual background

[2] The applicant (Mr de Klerk) concluded a credit agreement with the respondent (Griekwaland). As security for the debt, Mr de Klerk registered a second bond over his farm.

[3] Mr de Klerk fell behind with his payments and approached a debt counsellor, Debt Wise, who determined that he was over-indebted. In June 2010 Debt Wise delivered a purported debt-restructuring proposal (first proposal) to Griekwaland in terms of section 86(1) of the National Credit Act. The first proposal stated that Mr de Klerk owed R800 000[3] (excluding interest) and provided for this debt to be paid off in instalments of R1 066.01[4] over 157 months. These payments would not cover even the monthly interest on the debt owed to Griekwaland, and would total R167 364 only, falling far short of the outstanding debt.

[2] Section 8(g) of the Insolvency Act 24 of 1936 provides:

> "A debtor commits an act of insolvency if he gives notice in writing to any one of his creditors that he is unable to pay any of his debts".

[3] At certain points Mr de Klerk has disputed this amount but he does not seem to press the point in this Court.

[4] There is some confusion about this amount. Williams J's first judgment in the High Court noted a discrepancy: at some points in the papers, the amount was cited as R10 666.01, 10 times the amount in the proposal. But the figure in the debt-restructuring proposal is R1 066.01. Mr de Klerk does not put an alternative figure forward in his papers.

[4] Mr de Klerk's total indebtedness (to 17 creditors) was recorded as being over R2 million, with monthly instalments of just over R40 000. The first proposal provided for just under R15 000 to be paid each month to all creditors. Given his monthly living expenses, his income did not allow for any greater payment.

[5] On 5 August 2010 Mr de Klerk filed an application in the Magistrate's Court to make a further debt-restructuring proposal (second proposal), in which he again indicated that he owed Griekwaland R800 000, but provided for payment terms more advantageous to some of his creditors. In the founding affidavit, he stated that he could not meet his monthly financial obligations.

[6] Griekwaland applied for Mr de Klerk's provisional sequestration on 10 August 2010, contending that he owed approximately R1 million (including interest). At that point he had not made any payments towards the debt or interest since January 2009, although he contended that, despite his inability to make the payments as they fell due, his assets exceeded his liabilities. This contention was based on an outdated valuation of his farm which was not supported by any documentation. Mr de Klerk also counterclaimed R200 000 from Griekwaland for its failing to perform in terms of two other contracts. He later escalated this to an amount just shy of R2 million.

Procedural history

[7] The High Court provisionally sequestrated Mr de Klerk's estate on two grounds: the first proposal constituted an act of insolvency because it was an admission in writing of his inability to pay his debts in terms of section 8(g) of the Insolvency Act;[5] and he was in any event factually insolvent, which is an alternative statutory ground for sequestration.[6] The Court found that he was factually insolvent, in part because his allegation that his assets exceeded his liabilities was not supported by any evidence. The High Court later, after further argument, made this sequestration order final.

[8] Mr de Klerk unsuccessfully appealed to the Full Court. The Court held that the debt-restructuring proposal was an act of insolvency. He had argued that the proposal could not constitute an act of insolvency because he did not send it himself.[7] The Court rejected this, as it found that the proposal had been sent on his instruction. It also confirmed the finding that Mr de Klerk was factually insolvent.

[9] The Supreme Court of Appeal dismissed Mr de Klerk's application for leave to appeal. He now turns to this Court for relief.

[5] Quoted above n 2.

[6] Sections 9 and 12 of the Insolvency Act provide that a debtor may be provisionally or finally sequestrated on the basis of *either* an act of insolvency *or* factual insolvency. Section 9(1) provides that a creditor may apply for an order against "a debtor who has committed an act of insolvency, or is insolvent". Note that the terms "actual insolvency" and "factual insolvency" both refer to when a debtor's liabilities exceed her assets, and are used interchangeably in the judgment.

[7] This argument was based on the wording of section 8(g) of the Insolvency Act, above n 2, specifically the words "*he* gives notice in writing" (emphasis added).

Amendment of Griekwaland's citation

[10] As a result of an honest error, Mr de Klerk inaccurately cited the respondent in his papers in this Court. On the day of the hearing, his counsel formally applied to amend the respondent's citation to "Griekwaland Wes Korporatief Bpk". Griekwaland did not oppose the application. There is no reason why the amendment should not be granted.

Issues

[11] We must first consider whether this Court has jurisdiction. Does this matter raise a constitutional issue or an arguable point of law of general public importance which ought to be considered by this Court? If jurisdiction is established, is it in the interests of justice to grant leave to appeal, under the circumstances of this case?

Jurisdiction

[12] The Constitution, as amended by the Constitution Seventeenth Amendment Act,[8] provides that this Court has jurisdiction to decide a matter which "raises an arguable point of law of general public importance which ought to be considered by [the] Court".[9] Mr de Klerk contends that the question before us raises such a point. The constitutional amendment came into force before he filed his application. This Court has not yet determined the full scope of its new jurisdiction, including its possible retrospective application.

[8] 72 of 2012.

[9] Section 167(3)(b)(ii).

[13] The question whether a notice concerning debt restructuring (under section 86 of the National Credit Act) is or could be an act of insolvency (under section 8(g) of the Insolvency Act) is of some obvious significance. The answer may not be easy to find. Courts have reached conflicting decisions.[10] Academic opinion regarding the interaction between the Insolvency Act and the National Credit Act is not unanimous and writers appear to be waiting for an appellate court to resolve the dispute.[11] It has been argued that there is a tension between the two Acts,[12] but there may not be. Any solution would need to engage with the careful interpretive project of reading two statutes alongside each other.

[14] For present purposes, I assume we have jurisdiction under the Court's amended powers. But should we reach the central question? Mr de Klerk was found to be factually insolvent. Furthermore, a legislative amendment to the National Credit Act, which may address the legal issue at the heart of this case, has just been passed.[13] The question which arises is whether it is in the interests of justice for this Court to

[10] See, for example, *FirstRand Bank Limited v Janse van Rensburg and a related matter* [2012] 2 All SA 186 (ECP); *FirstRand Bank Ltd v Evans* 2011 (4) SA 597 (KZD); and *Nedbank Ltd v Maxwell* Case No 18027/2010, South Gauteng High Court, Johannesburg, 27 August 2010, unreported.

[11] See Boraine and Van Heerden "To Sequestrate or Not to Sequestrate in View of the National Credit Act 34 of 2005: A Tale of Two Judgments" (2010) 13 *PELJ* 84 at 107-9, 111 and 114; Chokuda "An Application for Debt Review Does Not Constitute an Act of Insolvency: *FirstRand Bank Ltd v Janse van Rensburg*" (2013) 130 *SALJ* 5 at 5 and 14; and Otto *The National Credit Act Explained* 2 ed (LexisNexis, Johannesburg 2010) at 133-4.

[12] See, for example, Steyn "Sink or Swim? Debt Review's Ambivalent 'Lifeline' – A Second Sequel to '... A Tale of Two Judgments' *Nedbank v Andrews* (240/2011) 2011 ZAECPEHC 29 (10 May 2011); *FirstRand Bank Ltd v Evans* 2011 (4) SA 597 (KZD); and *FirstRand Bank Ltd v Janse van Rensburg* [2012] 2 All SA 186 (ECP)" (2012) 15 *PELJ* 190 at 217; and Maghembe "The Appellate Division Has Spoken – Sequestration Proceedings Do Not Qualify as Proceedings to Enforce a Credit Agreement under the National Credit Act 34 of 2005: *Naidoo v Absa Bank* 2010 (4) SA 597" (2011) 14 *PELJ* 171 at 172 and 178.

[13] National Credit Amendment Act 19 of 2014, GN 389, *Government Gazette* 37665, promulgated on 19 May 2014. This Act does not yet seem to be in force, and shall come into operation on a date fixed by the President by proclamation in the *Gazette*.

determine the issue in view of Mr de Klerk's factual insolvency and the statutory amendment.

Factual insolvency

[15] The High Court (Williams J) and its Full Court (Kgomo JP, Pakati J and Mamosebo AJ) were satisfied that, even if the proposal sent to Griekwaland by Debt Wise did not amount to an act of insolvency, Mr de Klerk was factually insolvent. Because this conclusion was reached independently of the conclusion regarding the act of insolvency – and is a distinct justification for sequestrating an individual's estate – Griekwaland argues that this Court should not grant leave to appeal. This is because, even if we find in favour of Mr de Klerk on the main legal issue, there would still be a legitimate ground to order his estate to be sequestrated and his appeal would be doomed to fail.

[16] Counsel for Mr de Klerk conceded that whether he was actually insolvent is a question of fact. He submitted further that, in order to reach the act-of-insolvency enquiry at all, which is a matter of public importance, we need to resolve the factual insolvency question.

[17] This Court may in exceptional instances resolve disputes of fact, including when it is necessary to do so in order to determine the legal claim before it.[14] Yet we

[14] *Rail Commuters Action Group and Others v Transnet Ltd t/a Metrorail and Others* [2004] ZACC 20; 2005 (2) SA 359 (CC); 2005 (4) BCLR 301 (CC) at para 52. See also Madlanga J's judgment in *Mbatha v University of Zululand* [2013] ZACC 43; 2014 (2) BCLR 123 (CC) at para 223.

are reluctant to exercise this power.[15] Lower courts are often better placed to resolve factual disputes. The appellate function of this Court is thus seldom used to determine facts.

[18] No exceptional circumstances exist in this case. This Court should not lightly interfere with the factual findings of the High Court and the Full Court. Mr de Klerk offered us no principled reason why we should. In any event, he did not persuasively argue why the High Court's finding on factual insolvency is incorrect.

[19] If we cannot or should not interfere with the finding that Mr de Klerk is factually insolvent, it would make little sense for us to address the relationship between section 8(g) of the Insolvency Act and section 86 of the National Credit Act. It would make no difference to Mr de Klerk's fate. There are no reasonable prospects that he will be successful in his opposition to the sequestration application.

The amendment to the National Credit Act

[20] Prospects of success are not exhaustive of the interests of justice enquiry.[16] Are there other reasons to grant leave to appeal in this case? I think not. Rather, there is a further reason that militates against doing so. A legislative amendment to the National Credit Act was in process at the time of the application and was assented to by the

[15] See, for example, *Minister of Safety and Security v Van Niekerk* [2007] ZACC 15; 2008 (1) SACR 56 (CC); 2007 (10) BCLR 1102 (CC) at para 10.

[16] See, for example, *International Trade Administration Commission v SCAW South Africa (Pty) Ltd and Others* [2010] ZACC 6; 2012 (4) SA 618 (CC); 2010 (5) BCLR 457 (CC) at para 41; *Radio Pretoria v Chairperson, Independent Communications Authority of South Africa, and Another* [2004] ZACC 24; 2005 (4) SA 319 (CC); 2005 (3) BCLR 231 (CC) at para 19; and *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division and Others* [2003] ZACC 19; 2004 (1) SA 406 (CC); 2003 (12) BCLR 1333 (CC) at para 3.

President less than a week after the hearing in this Court.[17] The Schedule to the National Credit Amendment Act amends section 8 of the Insolvency Act by inserting the following:

> "Debt review
>
> 8A A debtor who has applied for a debt review must not be regarded as having committed an act of insolvency."

This insertion seems to be aimed at resolving the perceived tension between the National Credit Act and the Insolvency Act that forms the tangle at the centre of this case.[18] There would therefore be little benefit in attempting to clarify the issue comprehensively in this case.

Conclusion

[21] It is not in the interests of justice to grant leave to appeal. There is no need to proceed to the key question on the merits.

Costs

[22] I see no reason to deviate from the usual rule that costs follow the event.

[17] See above n 13.

[18] This Court has affirmed that it will not issue a judgment in a matter, the abstract, academic or hypothetical nature of which would mean that "our going into it can produce no concrete or tangible result, indeed none whatsoever beyond [a] bare declaration". *JT Publishing (Pty) Ltd and Another v Minister of Safety and Security and Others* [1996] ZACC 23; 1997 (3) SA 514 (CC); 1996 (12) BCLR 1599 (CC) at para 15. This is especially true when the relevant statutory provision has been amended.

Order

[23] The following order is made:

1. The application to amend the respondent's citation is granted.

2. Leave to appeal is refused.

3. The applicant is ordered to pay the respondent's costs in this Court.

For the Applicant:	Advocate J Steyn and Advocate D Greyling instructed by EG Cooper Majiedt Attorneys.
For the Respondent:	Advocate R Moultrie instructed by Van de Wall & Partners.