133/94

CASE NO: 709/92

N v H

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

SELWYN TRAKMAN N O

and

B LIVSHITZ & TWO OTHERS

SMALBERGER, JA

CASE NO: 709/92
N v H

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

SELWYN TRAKMAN N O — Appellant

and

B LIVSHITZ — 1st Respondent

FINANSFIN (PROPRIETARY) LIMITED — 2nd Respondent

JOHAN ERASMUS N O — 3rd Respondent

CORAM: JOUBERT, SMALBERGER, KUMLEBEN,
FH GROSSKOPF et HARMS, JJA

HEARD: 1 September 1994

DELIVERED: 26 September 1994

J U D G M E N T

SMALBERGER, JA:

The appellant is the duly appointed liquidator of Gold and Investment Brokers SA (Proprietary) Limited (in liquidation)

("GIBSA"). GIBSA previously carried on business as an investment broker. The second respondent ("Finansfin") was its banker. Monies obtained by GIBSA from clients were deposited with Finansfin. The first respondent ("Livschitz") was one of GIBSA's clients. On 30 May 1985 (seventeen days prior to GIBSA's provisional liquidation) Finansfin issued a cheque for one million rand in favour of Livschitz and debited GIBSA's account with that amount. The appellant alleges that in doing so Finansfin exceeded its authority. Consequently on 30 September 1986 the appellant instituted action against Finansfin and Livschitz (to whom, where appropriate, I shall refer jointly as "the respondents") in the Witwatersrand Local Division ("the main action"). He claimed, as against Finansfin, a reversal of the debit; in the alternative, against Livschitz, he sought appropriate relief in terms of sections 29, 30 and 31 of the Insolvency Act 24 of 1936 read with section 339 of the Companies Act 61 of 1973.

There appear to have been considerable delays associated with the litigation. In April 1992 the respondents launched an application to compel the appellant to furnish security for their costs. They each sought security in the amount of R150 000,00. The matter was settled, and the settlement made an order of court. Paragraph 1 of the order provided:

> "The respondent [appellant] is directed to furnish security for each of the applicants' costs of the action in an amount to be fixed by the Registrar."

Representatives of the parties in due course appeared before the third respondent ("the Registrar") to enable him to fix the amount of security. He determined the security payable to Livschitz and Finansfin in the amounts of R76 000,00 and R251 692,16 respectively. He further directed that security in respect of the latter amount was to be furnished by "bank guaranteed cheque. .to be paid within 10 days". This led to an application by the appellant in terms of Rule 53 of the Uniform Rules of Court to review and

set aside the Registrar's decision relating to the amount of security he was obliged to furnish, and the manner and time within which he was required to do so. The respondents in turn brought counter-applications in which each sought an order compelling the appellant to furnish security in the amount fixed by the Registrar within ten days of such orders, and certain ancillary relief. The Registrar elected not to file an affidavit (or report) or oppose the application. The matter came before ROUX, J. The respondents took the point in limine that the appellant had no locus standi to bring the application. The point was upheld by the learned judge. He did so on the basis that the appellant had ceded his rights of action against the respondents to one Alenson - a fact which he held the appellant had deliberately failed to disclose in his founding affidavit. He dismissed the appellant's allegation (in a later affidavit) that there had subsequently been a re-cession as "a deliberate lie made to mislead the court and the other litigants". He further held that,

in any event, such purported re-cession would have had no legal efficacy. ROUX, J, however, did not content himself with this finding. He went further, as appears from the following passage in his judgment:

> "There is a further consideration which relates to both the fate of the review and costs. Since May 1986 the applicant [appellant] and his attorney Kruger have had intimate and, as far as the other litigants are concerned, exclusive knowledge of the cession. On his own or on Kruger's advice the applicant has mislead this Court by his silence. This silence becomes all the more sinister when the delaying tactics of the applicant, as plaintiff, are taken into account. I need not list all the procrastinations. There is ample evidence before me to show sinister motives.
>
> The failure to disclose the cession for six years is inexcusable. This failure is only consistent with dishonesty. When dishonesty is harnessed to mislead the Court, to harass the other litigants and to obtain undue advantage it will be met with the sternest disapproval.
>
> Because of his behaviour I would also dismiss the application. I emphasize that 1 would have come to that decision regardless of my views on the cession expressed above."

Consequently ROUX, J, dismissed the application with costs. He ordered such costs to be paid by the appellant de bonis proprüs on a scale as between attorney and own client. In regard to the counter-applications he directed the appellant to furnish security in the amounts determined by the Registrar within ten days failing which the respondents were "at liberty to take such steps as they were advised". The appellant was further ordered to pay the costs of the counter-applications on a party and party scale. Leave to appeal was refused, but was subsequently granted by this Court.

In their heads of argument the respondents (despite their earlier stand) conceded that the appellant had locus standi to bring review proceedings and that the judge a quo had erred in finding to the contrary. This concession, which was repeated in argument, was correctly made. The appellant's locus standi to bring the main action was never put in issue on the pleadings. There had been an order by a court of competent and co-ordinate jurisdiction that the

appellant furnish security for the respondents' costs in amounts to be fixed by the Registrar. The issue to which such order related was res judicata as between the appellant and the respondents. The review proceedings arose as a consequence of the determination made by the Registrar pursuant to such order. The appellant had a direct and substantial interest in the outcome of such determination and the process by which it was reached, and hence in the subject matter of the review proceedings. Accordingly he had the legal capacity to institute review proceedings in the present matter (Jacobs en 'n Ander v Waks en Andere 1992(1) SA 521(A) at 533J - 534C). This finding renders it strictly unnecessary to say anything about the question of cession, on which the court a quo's judgment was based. However, in the light of the strictures passed by ROUX, J, upon the appellant's alleged dishonesty and the impropriety of his (or his attorney's) conduct, certain observations are called for.

It appears from the papers that Alenson was a creditor of GIBSA and had proved a claim against its estate. Alenson made an offer to the appellant, as liquidator, to acquire the claims on which the main action is based. The offer was made prior to the institution of action. The offer, the details of which had previously been circularised to all known creditors of GIBSA, was put to creditors at a general meeting held on 7 May 1986. The offer was accepted by them and consequently by the appellant, and the Master of the Supreme Court was informed accordingly. In terms of the offer the creditors retained a stake in whatever balance remained (after certain deductions) of any monies recovered. The cession was therefore not the product of an underhand deal prejudicial to creditors. Rather it appears to have been intended to fund litigation the estate might otherwise not have been able to afford. There is substance in the argument that the cession (at least insofar as the alternative claims against Livschitz are concerned)

was invalid as such claims were incapable of cession by the appellant (South African Board of Executors and Trust Co Ltd (In Liquidation) v Gluckman 1967(1) SA 534(A)). This was also the view originally taken by Livschitz. In paragraph 6.3 of his founding affidavit in respect of his counter-application there is stated:

> "It will be submitted on behalf of the First Respondent at the hearing of this matter that the Applicant's claims against the First Respondent, arising as they do under the provisions of the Insolvency Act no 24 of 1936, as amended, are not capable of being ceded by the Applicant to ALENSON."

I do not need to make a specific finding in this regard. Nor is it necessary to consider the cession further, or the allegation (which on the record stands unchallenged) that in any event there was a re-cession. The point is that, whatever the correct legal position, there does not necessarily appear, judging from the record, to have been a sinister reason for the non-disclosure of the cession. While the appellant may possibly have been lacking in candour in

not referring to it in his founding affidavit, his failure to do so is not necessarily indicative of deliberate dishonesty on his part. So too, in the context in which it was claimed that there had been a re-cession, there would seem to be no sound reason for branding it "a deliberate lie". Once again I specifically refrain from making any definite finding in this regard as it is not necessary to do so for the purposes of this judgment. Locus standi existed apart from the question of cession. Once that is so the appellant's alleged non-disclosure and dishonesty were in any event irrelevant to the question of whether or not he had locus standi.

Mr Pincus, for the respondents, sought however to support the alternative basis on which ROUX, J, purported to dismiss the application, as set out in the passage from his judgment quoted above. It is trite law that in an ex parte application the utmost good faith must be observed by an applicant. A failure to disclose fully and fairly all material facts known to him (or her) may lead, in the

exercise of the court's discretion, to the dismissal of the application on that ground alone (see eg Estate Logie v Priest 1926 AD 312 at 323; Schlesinper v Schlesinper 1979(4) SA 342((W) at348E-35OB). 1 know of no authority, and Mr Pincus was unable to refer us to any, which extends that principle to motion proceedings and would justify the dismissal of an opposed application (irrespective of the merits thereof) for the reasons given by the judge a quo. Nor is there any sound reason for so extending the principle. Material non-disclosure, mala fides, dishonesty and the like in relation to motion proceedings, may, and in most instances should, be dealt with by making an adverse or punitive order as to costs but cannot, in my view, serve to deny a litigant substantive relief to which he would otherwise have been entitled. No justification therefore existed for the dismissal of the application on the alternative basis. There is also a further relevant consideration. The appellant's alleged conduct as a ground for the dismissal of his

application was never put in issue on the papers. It was never claimed that his conduct amounted to an abuse of the process of the court. Nor does the matter appear to have been fully debated on that ground in the court below. It is apparently common cause that the only issue with which ROUX, J, was confronted in limine, and the only matter on which he was required to rule, related to the appellant's locus standi. He was not called upon to deal with the merits (or demerits) of the application at that stage. He appears to have proceeded to deal with the application on the alternative basis of his own accord without affording counsel a full hearing. This he was not entitled to do.

In the circumstances I am satisfied that ROUX, J, erred in dismissing the application on the grounds on which he purported to do so. That, however, is not the end of the matter. The respondents contend that the judgment, even if it is wrong, is nevertheless not appealable. I turn now to address this issue.

In Zweni v Minister of Law and Order 1993(1) SA 523(A) this Court reaffirmed (at 5321 - 533A) that an appealable "judgment or order", as envisaged by sec 20(1) of the Supreme Court Act 59 of 1959 was

> "a decision which, as a general principle, has three attributes, first, the decision must be final in effect and not susceptible of alteration by the Court of first instance; second, it must be definitive of the rights of the parties; and, third, it must have the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings."

The order in the present matter has all the attributes (at least in form) of an appealable "judgment or order". The order upholding the point in limine and dismissing the application on the ground of absence of locus standi (as well as on the alternative basis) was final and not susceptible of alteration by the court a quo; it was definitive of the parties' rights in respect of the application for review; and it disposed of all the relief claimed in such application. However, in determining the nature and effect of a

judicial pronouncement "not merely the form of the order must be considered but also, and predominantly, its effect" (South African Motor Industry Employers' Association v South African Bank of Athens Ltd 1980(3) SA 91(A) at 96 H; Zweni v Minister of Law and Order (supra) at 532I).

The gist of the respondents' argument, as I understood it, was this: the review of the Registrar's decision was merely a procedural step in the main proceedings; an order by a judge to furnish security for costs is not appealable (Petz Products (Pty) Ltd v Commercial Electrical Contractors (Pty) Ltd 1990(4) SA 196(C) at 211G - 212E); by parity of reasoning the grant or refusal of the review of the Registrar's decision should also not be appealable.

In my view this argument overlooks the essential nature of review proceedings. The Registrar's decision, being in the nature of an administrative act, was always susceptible of review provided the necessary grounds for review existed (Pharumela and Others v St

John's Apostolic Faith Mission of SA and Another 1975(1) SA 311 (T) at 313A). Any application for review would be a substantive one in its own right. The review proceedings were separate and distinct - they were not merely an extension or ancillary part of the main action. The Registrar, an indispensable party in such proceedings, was not a party to the main action. ROUX, J's order was intended to be definitive of the rights of all the parties to the review application, and to finally dispose of those proceedings in the court a quo. The present situation is somewhat analogous to that where an exception is taken where the lack of a plaintiff's locus standi is apparent ex facie the pleadings (Ahmadiyya Anjuman Ishaati-Islam Lahore (South Africa) and Another v Muslim Judicial Council (Cape) and Others 1983(4) SA 855(C)). If the exception is upheld the court's order is clearly appealable as it strikes at the heart of the matter and is final in its effect (Trope and Others v South African Reserve Bank 1993(3) SA 264(A) at 270G). (See too

Caroluskraal Farms (Edms) Bpk v Eerste Nasionale Bank van Suider-Afrika Bpk 1994(3) SA 407(A) at 416C-F.)

In the result, for the reasons given, ROUX, J's order is appealable. It is accordingly not necessary to deal with the appellant's alternative argument viz whether the principles relating to the doctrine of "issue estoppel" (if it is part of our law - a matter still open to doubt) would have rendered the order appealable. Once it is held that the order in respect of the review application is appealable, that in relation to the counter-applications (which were dependent for their success on the fate of the review application) must also be.

It follows that the appeal must succeed. The order of the Court a quo dismissing the review application, as well as its order of costs, must be set aside. It therefore becomes unnecessary to consider whether the punitive order for costs that was made would otherwise have been justified (a matter open to considerable doubt,

to say the least). The order in respect of the counter-applications will, in turn, have to be set aside. The parties are agreed that the application for review should be referred back to the Witwatersrand Local Division for hearing and determination. It would be inappropriate for the matter to come before the judge a quo again. Mr Pincus contended that, irrespective of the outcome of the appeal, the appellant should be ordered to pay the costs thereof, or be deprived of his costs, as a mark of disapproval of his conduct. There is nothing in the appellant's conduct in relation to the appeal to justify such an order. If there is any call for an adverse order as to costs in relation to the proceedings, the appropriate time to make such order will be after the hearing of the review application. No sound reason therefore exists to depart from the normal rule that costs should follow the result. The appellant contended that the respondents should pay his appeal costs on an attorney and client basis because they persisted in clinging to the decision of the court

a quo despite their concession that the point in limine should not have succeeded. The fact that they unsuccessfully sought to resist the appeal and defend the judgment on other (albeit flimsy) grounds is not in itself a sufficient reason for a punitive order as to costs.

Finally, the fact that the appeal record appears to have been burdened with unnecessary documentation calls for comment. In the appellant's heads of argument it was stated that it was not necessary to have regard, for the purposes of the appeal, to more than approximately one third of the total record of 794 pages. It would seem,prima facie, that unnecessary costs have been occurred. None of the parties, however, sought any special order as to costs in respect of the record. It is timely to again draw attention to, and to emphasize, the remarks of CORBETT, JA, in Government of the Republic of South Africa v Maskam Boukontrakteurs (Edms) Beperk 1984(1) SA 680(A) at 692G - 693A where he said the following:

> "In recent years this Court has on a number of occasions drawn attention to the unnecessary inclusion in appeal records of numerous and sometimes lengthy documents and has made appropriate orders relating to the needless costs occasioned thereby. (See eg Omega Africa Plastics case supra; Olivier NO v Rondalia Versekeringsmaatskappy van SA Bpk 1979(3) SA 20(A) at 36B-D; Woji v Santam Insurance Co Ltd 1981(1) SA 1020(A) at 1030; Die Meeker v Joubert en Andere 1981(4) SA 211(A) at 228.) Despite what has been said and ordered in these and other cases the practice of including unnecessary documents in appeal records persists. In my opinion, it is the duty of attorneys responsible for the preparation and lodging of appeal records to ensure that, if possible, this does not occur and thereby to obviate the incurring of unnecessary costs. Failure to perform this duty could amount to a breach of the duty of care owed by the attorney to his client. The time may come when this Court may consider it appropriate in such cases to order the such unnecessary costs be paid by the attorney concerned de bonis proprüs (cf Machumela v Santam Insurance Co Ltd 1977(1) SA 660(A) at 664A-C)."

(See too Louw v W P Koöperatief Bpk en Andere 1994(3) SA 434(A) at 447.) Practitioners who fail to heed these remarks in future do so at their own peril. They cannot be heard to say that

they were not warned.

In the result the following order is made:

1) The appeal is upheld, with costs, including the costs consequent upon the employment of two counsel.

2) The orders of the court a quo in relation to both the review application and the counter-applications are set aside and replaced with the following order:

"The first and second respondents' point in limine is dismissed with costs."

3) The review application and the counter-applications are remitted to the Witwatersrand Local Division for hearing and determination by a different judge.

J W SMALBERGER
JUDGE OF APPEAL

JOUBERT, JA) KUMLEBEN, JA) FH GROSSKOPF, JA) CONCUR HARMS, JA)