THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case number : 84/06
Reportable

In the matter between :

STEFANO BRUNO GHERSI	1ST APPELLANT
MICHELE VITTORIO GHERSI	2ND APPELLANT
PHARMTEC SA	3RD APPELLANT

and

TIBER DEVELOPMENTS (PTY) LTD	1ST RESPONDENT
FRANCESCO RIVERA	2ND RESPONDENT
STEVEN DAVID SCOTT	3RD RESPONDENT
GASPAR DA SILVA CARDOSO	4TH RESPONDENT

CORAM : HOWIE P, CLOETE, JAFTA, PONNAN *et* CACHALIA JJA

HEARD : 15 MARCH 2007

DELIVERED : 29 MARCH 2007

Summary: Section 266 of the Companies Act, 61 of 1973: The mandate of a provisional curator *ad litem* to investigate the affairs of the company is limited to the grounds alleged in the shareholder's application to court; but a court may in certain circumstances authorise the institution of legal proceedings against the company based on wider grounds.

Neutral citation: This judgment may be referred to as *Ghersi v Tiber Developments (Pty) Ltd* [2007] SCA 43 (RSA).

JUDGMENT

CLOETE JA/

CLOETE JA:

[1] The Ghersi and Rivera families around whom this litigation primarily revolves have been involved in the construction industry in South Africa since Mr Bruno Ghersi and Mr Paolo Rivera came to this country at the end of the Second World War and built Tiber Mansions in Rosebank, Johannesburg. It is unnecessary to set out all the complex and at times confusing inter-relationships which existed from time to time between them in the corporate vehicles which they used to advance their business interests. The following summary will suffice. The first respondent, Tiber Developments (Pty) Ltd ('the Company'), was established in 1976. In 1983 it was restructured so that 45% of the shares were held by the Ghersi family and 55% by the Rivera family and the fourth respondent. The shareholding of the Ghersi family is held by the appellants. The second, third and fourth respondents, Messrs Francesco Rivera, Steven David Scott and Gaspar da Silva Cardoso, became directors of the company in 1973, 2000 and 1988 respectively. After the 1983 restructuring of the company, the second, third and fourth respondents undertook property developments through companies in which members of the Ghersi family had no interest. In due course Tiber Projects (first a closed corporation and later a company) was formed. The shareholders of Tiber Properties were effectively the second and third respondents and Mr Germano Cardoso, the son of the fourth respondent, and they were also the directors of that company. In 1991 Tiber Properties was appointed by the Company to manage its affairs.

[2] The appellants, as the shareholders of the company, sought redress against the second to fourth respondents, the directors of the Company, in terms of s 266 of the Companies Act, 61 of 1973. That section provides:

'(1) Where a company has suffered damages or loss or has been deprived of any benefit as a result of any wrong, breach of trust or breach of faith committed by any director or officer of that company or by any past director or officer while he was a director or officer of that company and the company has not instituted proceedings for the recovery of such damages, loss or benefit, any member of the company may initiate proceedings on behalf of the company against such director or officer or past director or officer in the manner prescribed by this section notwithstanding that the

company has in any way ratified or condoned any such wrong, breach of trust or breach of faith or any act or omission relating thereto.

(2)

(a) Any such member shall serve a written notice on the company calling on the company to institute such proceedings within one month from the date of service of the notice and stating that if the company fails to do so, an application to the Court under paragraph (b) will be made.

(b) If the company fails to institute such proceedings within the said period of one month, the member may make application to the Court for an order appointing a *curator ad litem* for the company for the purpose of instituting and conducting proceedings on behalf of the company against such director or officer or past director or officer.

3. The Court on such application, if it is satisfied ─

(a) that the company has not instituted such proceedings;

(b) that there are *prima facie* grounds for such proceedings; and

(c) that an investigation into such grounds and into the desirability of the institution of such proceedings is justified,

may appoint a provisional *curator ad litem* and direct him to conduct such investigation and to report to the Court on the return day of the provisional order.

(4) The Court may on the return day discharge the provisional order referred to in subsection (3) or confirm the appointment of the *curator ad litem* for the company and issue such directions as to the institution of proceedings in the name of the company and the conduct of such proceedings on behalf of the company by the *curator ad litem*, as it may think necessary and may order that any resolution ratifying or condoning the wrong, breach of trust or breach of faith or any act or omission in relation thereto shall not be of any force or effect.'

A provisional curator was appointed by the Johannesburg High Court but the provisional order was discharged on the return day by Fevrier AJ. It is against that order which the appellants appeal, with the leave of this court.

[3] The purpose of s 266 is, briefly stated, to create a remedy whereby delinquent directors or officers of a company can be compelled to compensate the company for a wrong committed by them, whilst seeking to minimise the risk of unmeritorious claims being brought against the company by disaffected shareholders.[1] For present purposes, it is necessary to emphasise that the section seeks to achieve this latter object by what has aptly been categorised as a 'dual screening procedure'.[2] At the first stage, when the appointment of a provisional curator *ad litem* is sought, the

[1] *Commission of Enquiry into the Companies Act*, Main Report RP 45/1970 para 42.10-18.
[2] Blackman Jooste & Everingham, *Commentary on the Companies Act* vol 2 p 9-177.

court must be 'satisfied' inter alia that there are prima facie grounds for the proceedings that the member seeks to have instituted against the company. This requirement would be fulfilled:

'. . . where there is evidence which, if accepted, will show a cause of action. The mere fact that such evidence is contradicted would not disentitle the applicant to the remedy. Even where the probabilities are against him, the requirement would still be satisfied. It is only where is it quite clear that he has no action, or cannot succeed, that [a remedy] should be refused . . . on the ground here in question.'[3]

The court also has to be satisfied at the first stage that an investigation into the grounds alleged by the shareholder and the desirability of the institution of the proceedings proposed, is justified. At the second stage, on the return day, when the court has to consider whether to discharge the provisional order or to confirm the appointment of the curator, the section envisages that it will have the advantage of a report by the provisional curator dealing inter alia with his investigation into the grounds for the proceedings proposed by the member. A decision by the court that proceedings should be instituted by the curator can have serious implications for the company concerned, its directors and members. It therefore goes without saying that a proper report by the provisional curator is vital to the exercise by the court of the powers vested in it by s 266(4).

[4] The provisional curator is not confined in the investigation to the remedies suggested by the shareholder.[4] The provisional curator is, however, confined in the investigation to the grounds advanced by the shareholder in the application (not the statutory notice, because a shareholder may decide to jettison some of these grounds in the application to court). It is the grounds advanced in the application which constitute the basis of the finding by the court that a prima facie case for the appointment of a curator has been made out and therefore the ambit of the mandate given to the curator by the court is confined to those grounds. Consequently, although a provisional curator has the powers of an inspector under s 260 of the Act,[5] the order of court appointing the provisional curator must be interpreted as

[3] *Bradbury Gretorex Co (Colonial) Ltd v Standard Trading Co (Pty) Ltd* 1953 (3) SA 529 (W) at 533C-E. See also *Brown v Nanco (Pty) Ltd* 1976 (3) SA 832 (W) at 835D.
[4] *Thurgood v Dirk Kruger Traders (Pty) Ltd* 1990 (2) SA 44 (E) at 52I-53C, distinguishing *Loeve v Loeve Building and Civil Engineering Contractors (Pty) Ltd* 1987 (2) SA 92 (D).
[5] In terms of s 267(1) but subject to s 267(2) of the Companies Act.

being limited to this purpose.[6] If a provisional curator seeks to go outside his mandate the directors or officers of the company could refuse to cooperate or interdict him from doing so. What would ordinarily be required for the investigation to continue in such a case would be an amplification of the provisional curator's mandate by the court, based on a prima facie case that the new grounds exist and should be investigated; and it is a shareholder, not the curator (and not necessarily the same shareholder who brought the original application) who would have to bring such an application, after a notice to the company in terms of s 266(2)(a) had been served on the company. Nevertheless, form should not be allowed to defeat the purpose of the section. It is conceivable that a court might be satisfied that the company would not institute proceedings even if given the statutory notice, that the new grounds not specified in the order appointing the provisional curator had been adequately investigated and that the institution of proceedings on those grounds would be desirable. In such a case a court could, at the instance of a shareholder, legitimately confirm the appointment of the provisional curator to enable the latter to institute action based on such grounds. The alternative would be for the court to require formal compliance with the requirements of s 266(2) and (3) — a hollow exercise if the resultant confirmation would be a foregone conclusion.[7] Such cases will, however, be rare.

[5] I return to the facts of the present matter. The appellants served a statutory notice dated 27 November 2003 on the company. The notice required the company to institute proceedings against the directors for payment of amounts totalling R98 288 446,53, allegedly misappropriated by the directors in one way or another; interest on such amounts, totalling R122 759 992; and a statement of account of transactions undertaken by the directors which had been improperly funded by the Company together with an order compelling the directors to pay to the Company the profits (past and future) made from such transactions. The Company instructed its auditors, KPMG, to investigate the allegations made in the notice, and after

[6] *Loeve's* case above, n 4, p 102B-E.
[7] I therefore respectfully disagree with the decision in *Loeve* (above, n 4, at 101F-I) to the extent that it holds the contrary.

consideration of this report, it took a formal decision not to institute the proceedings. The appellants brought an application in the Johannesburg High Court for the appointment of a provisional curator *ad litem*. The application was not opposed by the company or the directors, who took up the attitude that the grounds alleged in the founding affidavit were without foundation but that they had nothing to hide, and it was granted subject to all questions relating to costs being reserved.

[6] The notice of motion followed the terms of the statutory notice, with one possible exception. The appellants' counsel argued, and the respondents' counsel disputed, that the statutory notice referred to misappropriation of corporate opportunities divorced from the allegation that company funds had been misappropriated. It is not necessary to resolve the dispute as the appellants' counsel was constrained to concede that there was no such allegation in the notice of motion. In the founding affidavit, the purpose of the application was thus stated:

'As will appear more fully hereunder, this application has been brought with a view to legal proceedings being instituted by [the Company] against three of its directors, Rivera, Cardoso and Scott ("**the implicated directors**") whom, the Applicants maintain, have misappropriated, or unlawfully withdrawn funds from [the Company] which they have utilised for their own private purposes. The funds concerned were paid to, and utilised by certain companies, in which [the Company], subject to what is stated in 21 has no shareholding or other financial interest whatsoever, and which have been described in the financial statements of [the Company] as "*affiliated companies*". The implicated directors or their nominee are members of the *affiliated companies* and the *affiliated companies* are controlled by the implicated directors or their nominees.'

Misappropriation of the Company's funds was the repeated refrain in the allegations which followed. There was no allegation that the directors had misappropriated corporate opportunities, as opposed to, or independently of, the alleged misappropriation of funds of the Company. The appellants' counsel sought to contend the contrary, relying on the following paragraph of the founding affidavit:

'In respect of transactions of the *affiliated companies* where funds and assets of [the Company] were not so deployed by the implicated directors, I am advised and submit, that the implicated directors are nonetheless accountable to [the Company] for the secret profits made because they embarked upon those opportunities in competition with [the Company], in circumstances where [the Company] declined the opportunity to participate itself in those opportunities, because of the false picture which had been created by the implicated directors in the minds of the directors who represented the

Applicants, namely John Ghersi and myself, that [the Company] had limited resources with which to pursue some of the corporate opportunities concerned, when that situation was attributable to the misappropriation and/or unlawful lending of [the Company's] funds to the *affiliated companies* at the instance of the implicated directors.'

Counsel's reliance on this paragraph is misplaced. The allegations in that paragraph also have as their foundation the allegation that monies of the company were misappropriated: the reason why the Company did not pursue opportunities, according to the appellants, is because the directors represented that it did not have the funds to do so whereas, according to the appellants, the reason why there was no money in the Company was precisely because funds of the Company had been misappropriated.

[7] The curator went about his task conscientiously. The Company made available to him 2000 pages of documents which he collated, paginated and indexed in six files. In view of the complexity of the accounting issues which required forensic investigation, he retained the services of an acknowledged expert in the field, Professor Wainer, who furnished him with a report. The Company commissioned a separate forensic accounting report by PricewaterhouseCoopers. The provisional curator examined the deponent to the founding affidavit, Mr Paolo Michele (Michael) Ghersi, the second applicant, Mr Michele Vittorio Ghersi, and the second and third respondents, Messrs Francesco Rivera and Steven David Scott, over a period of eight days. Not surprisingly, in view of the contents of the notice of motion and the allegations in the founding affidavit, the provisional curator concentrated on the allegation that funds of the Company had been misappropriated. The curator produced a 129 page report which dealt in detail with his investigation and the views he had formed, which were fully motivated. He came to the following conclusions:

'The claim advanced in the application for payment of R98 288 446,53 cannot be sustained.

. . .

The claim for interest which is sought to be recovered in the sum of R122 759 992 is not based on valid grounds . . .

. . .

At present, there has been no loss or damage or deprivation of opportunity as a result of the contravention of s 226 of the Companies Act or any breach or fiduciary duties by the named directors

on any grounds set out in the application.' (Underlining supplied.)

The provisional curator went on, however, to recommend the institution of proceedings against the directors for a statement of account of all property developments and opportunities undertaken by them (direct or indirectly) over the previous 23 years which were not offered to the Company, for debatement of the account and for payment of all profits (present and future) made by them. In making this recommendation, the provisional curator went outside his mandate. The question which arises, however ─ assuming in favour of the appellants that the Company would not have instituted proceedings had the statutory notice been served on it ─ is whether there was nevertheless a proper investigation on the strength of which the court *a quo* could legitimately have granted the relief recommended by the provisional curator. The appellants' counsel submitted that there was. I disagree.

[8] The curator investigated the competing versions as to the shareholders' agreement which both sides contended existed, and rejected both. He then said:

'I am of the view that no agreement has been demonstrated which relieved the named directors of their fiduciary duties which required them to present each opportunity identified by them for property development to [the Company] for consideration by the Board of Directors of [the Company] or which released to them or to companies in which they had an interest the opportunities not presented by them through Tiber Projects to [the Company].'

It is in this respect that the investigation by the curator was inadequate to support the relief recommended by him. What would have been required absent amplification of the provisional order was an investigation of the ambit of the fiduciary duty owed by the directors to the Company; an examination of the property developments undertaken by the directors to ascertain whether they should have been offered to the Company in compliance with that fiduciary duty; and an investigation as to the extent of profits earned from those developments.

[9] It does not follow that because a person is a director of a company which engages in property development, such person is automatically, in the absence of an agreement to the contrary, obliged to offer all property developments of whatever

nature to the company, on pain of being held to have breached his or her fiduciary duty to the company and being required in consequence to hand over profits made from the developments not so offered. As Bristowe AJA held in *Robinson v Randfontein Estates Gold Mining Co Ltd*:[8]

'To establish that the defendant's purchase in 1906 was covered by his fiduciary relation or his agency or an implied mandate (I do not think it makes much difference which term is employed) it would not be enough to show that the purchase was within the company's power or that the property might have been useful to it. *Burland v Earle* is against this. Besides it would be intolerable if a director, even though occupying the defendant's position, could be held accountable for any private purchase of property merely because his company might conceivably want it.'

That the ambit of the duty can change from time to time, appears from the decision of this court in *Bellairs v Hodnett*.[9] In summary, as this court held in *Phillips v Fieldstone Africa (Pty) Ltd*:[10]

'The existence of [a fiduciary duty] and its nature and extent are questions of fact to be adduced from a thorough consideration of the substance of the relationship and any relevant circumstances which affect the operation of that relationship …'.[11]

Such an investigation was not adequately performed by the provisional curator. In particular, the business that the Company was actually carrying on or intended to carry on at the time when each development was undertaken was not sufficiently identified. Nor, indeed, were most of the developments undertaken by the directors over the 23 year period stipulated by the curator identified at all. It does not suffice, as was submitted on behalf of the appellants, for the curator to recommend the institution of proceedings where the directors would be obliged, as a first step, to provide a statement of all property developments undertaken by them and not offered to the Company. The anterior question is what property developments, if any, the directors were required to offer to the Company; and that depends as much on the extent of the fiduciary duty owed by them to the Company from time to time as it

[8]1921 AD 168 at 268.
[9]1978 (1) SA 1109 (A) at 1128A-1134D.
[10]2004 (3) SA 465 (SCA) at 477H.
[11]See also *Howard v Herrigel NNO* 1991 (2) SA 660 (A) at 678B-C.

does on an identification of the property developments themselves. In addition the investigation into profits made in some property developments ─ which may or may not have been in breach of the directors' fiduciary duties ─ was superficial. Only a handful of property developments out of scores which were undertaken in the past 20 or so years by the 15 companies involved were even mentioned and the curator's examination of the second respondent in this limited regard was prefaced by the introduction: 'Just by way of interest were all of these properties besides this one which you told you have lost money on, were they profitable projects or were there others on which money was lost?' The reply was in fairly general terms.

[10] All in all, the investigation of the provisional curator does not provide a sufficient basis for the massive litigation recommended by him. Of course, the scope of the litigation is not itself a reason for refusing confirmation of the rule; but before the Company and the directors are put to the inconvenience and expense of such litigation, the court must be in a position properly to exercise the powers conferred on it in terms of s 266(4). That, of necessity, requires a proper report from the provisional curator. It is not necessary to consider what remedies the shareholder who has brought s 266 proceedings has when the provisional curator's report is inadequate. In the present matter the appellants supported the recommendation of the curator on the basis of his report. In the circumstances the court *a quo* was correct in discharging the provisional order.

[11] The appeal is dismissed with costs, including the costs of two counsel.

_____
T D CLOETE
JUDGE OF APPEAL

Concur: Howie P
Jafta JA
Ponnan JA
Cachalia JA