



CONSTITUTIONAL COURT OF SOUTH AFRICA

Nicolaas Johannes Swart v Conrad Alexander Starbuck and Others

CCT 153/16

Date of judgment: 29 June 2017

MEDIA SUMMARY

The following explanatory note is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.

On 29 June 2017 the Constitutional Court handed down judgment in an application for leave to appeal against a judgment of the High Court of South Africa, Gauteng Division, Pretoria, dismissing Mr Swart's claim for damages under section 82(8) of the Insolvency Act 24 of 1936 (Act). Mr Swart also sought condonation for the late filing of his application for leave to appeal.

Mr Swart's estate was sequestrated on 1 November 2005. On 16 November 2005 the L J Moller Trust submitted three conditional offers to Mr Starbuck to purchase certain properties forming part of the estate. Mr Starbuck had not yet been appointed as a trustee at this stage, but the Master had advised him that he intended to appoint him as a provisional co-trustee. Mr Swart accepted the offers on 1 December 2005. The offers were subject to the suspensive condition that the Master grant the required consent, if applicable.

On 12 January 2006 Mr Starbuck and his co-trustees (before their formal appointment as provisional trustees) submitted a written application to the Master for the authority to sell the properties in terms of section 80*bis* of the Act. Section 80*bis* provides that, at any time before the second meeting of the creditors, the trustees may recommend to the Master that property be sold, and the Master may authorise the sale. On 24 January 2006 the first to third respondents were appointed as provisional trustees of Mr Swart's insolvent estate, and on 31 January 2006 the Master consented to the sale of the properties.

Mr Swart instituted action against the Master and the trustees in the High Court for damages in the amount of R11 410 000. He argued that section 82(1) of the Act (dealing with the sale of property after the second meeting of the creditors) was not complied with, and that he was accordingly entitled to statutory damages in terms of section 82(8). This section provides that, where a property that forms part of an insolvent estate is sold in contravention of section 82, the sale remains valid, but the person who sold the property is liable to pay damages to the insolvent estate of twice the amount of the loss the estate sustained. The High Court held that, because the trustees had been granted the necessary authorisation by the Master to sell the properties in terms of section 80*bis*, section 82 was not applicable. Further, there was no reason to conclude that the properties could have been sold at a higher price. Accordingly, the High Court dismissed the action. This decision was upheld by the Supreme Court of Appeal.

In the Constitutional Court, Mr Swart persisted in the argument that section 82 was not complied with, and that he was entitled to damages under section 82(8). He also raised for the first time two new issues that had not been raised in the Courts below: first, a challenge to the constitutionality of sections 18(3) and 80*bis* of the Act; and, second, a challenge to the validity of the Master's authorisation in terms of section 80*bis*. Mr Starbuck submitted that the sale was authorised by the Master, and remained valid until set aside. Further, he argued that Mr Swart was precluded from raising new issues at that late stage. The matter was determined under the Court's Rules without hearing oral argument but after inviting and receiving written submissions from the parties.

In a majority judgment, penned by Khampepe J (Mogoeng CJ, Nkabinde ADCJ, Cameron J, Froneman J, Madlanga J, Mhlantla J and Pretorius AJ concurring), this Court granted condonation but held that it was not in the interests of justice to determine the appeal; leave to appeal was accordingly refused, with costs. The Court found that Mr Swart's claim was based on section 82 of the Act. The application of this section depends on the absence of a valid authorisation by the Master for the sale of the properties. As the Master had authorised the sale of the properties in terms of section 80*bis*, and this authorisation had not been set aside, the Court held that section 82 did not apply. Further, on the facts, Mr Swart had not proved any damages, and the trustees could not be held liable for damages that had not been proved.

The Court went on to find that Mr Swart's purported constitutional challenge was raised impermissibly for the first time in the Constitutional Court, a Court of final appeal. The Court then considered the purported challenge to the Master's section 80*bis* authorisation. It held that the authorisation by the Master was an administrative act, which had legally valid consequences until set aside. As no attempt had been made by Mr Swart to have the authorisation set aside, his argument that, because the trustees had not been appointed at the time they made the recommendation to the Master, section 80*bis* had not been complied could not be sustained.

In a minority judgment (concurring in by Mojapelo AJ), Jafta J agreed that condonation should be granted, but disagreed with the outcome reached by the majority and the reasons supporting it. The minority held that leave to appeal should be granted and the appeal upheld. The minority held that the matter concerned the exercise of public power conferred by section 80*bis*, but agreed with the majority that it did not raise a constitutional issue. The applicant challenged the validity of the Master's approval. When the trustees submitted the purported recommendation, they were not yet appointed as provisional trustees. The question that ought to have been considered by the Constitutional Court, which was overlooked by the other Courts, was whether section 80*bis* contemplated the "recommendation" of the sale as a jurisdictional fact for the granting of an approval. The minority concluded that, indeed, the recommendation was a condition precedent or jurisdictional fact for the exercise of the Master's power. Absent the recommendation, the Master may not exercise the power. Therefore, what was done on the strength of the invalid approval was also invalid. This is because an invalid act that was performed unlawfully cannot render legal another act which was unlawful. Nor can an unlawful act justify another act that was unlawful. In these circumstances, the minority judgment would have held that leave to appeal must be granted.

In a separate judgment, Zondo J concurred in the order in the majority judgment partly for some of the reasons given in the majority judgment and partly for the reason that to require the first to the third respondents to have withdrawn their application to the Master of the High Court for authorisation to sell the properties once they had been appointed as trustees and only to re-submit it would have been the height of formalism. Zondo J thus concluded that the application for leave to appeal should be dismissed because it was not in the interests of justice to entertain it and because there were no reasonable prospects of success.