IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE DIVISION, GRAHAMSTOWN

Case no. 1697/19

In the matter between:

CLOETE MURRAY N.O. AND OTHERS **1st Applicant**

THOMAS VAN ZYL N.O. **2nd Applicant**

RAPHAEL BRINK N.O. **3rd Applicant**

CARON-ANN SCHROEDER N.O. **4th Applicant**

In their capacities as joint liquidators of Cape Concentrate (Pty) Ltd (in liquidation)

and

HUMANSDORP CO-OPERATIVE **Respondent**

RULING

LEAVE TO APPEAL

STRETCH J:

[1] This is an application by the cited applicants for leave to appeal to the SCA against the whole of my judgment dated 26 July 2021 (with the exception of paragraph (b) of the ensuing order), in terms of which I made the following order:

(a) The application is dismissed with costs, which costs shall include the costs of two counsel, and shall exclude the costs of 4 June 2020.

(b) The Respondent (Humansdorp Co-operative Limited) is ordered to pay the wasted costs occasioned by the postponement of the application on 4 June 2020.

[2] The respondent herein opposes the application, and applies for leave to cross-appeal (to the full court of this division) my finding that the payment to the respondent on 8 May 2015 was a disposition by Cape Concentrate (the Company in liquidation), only if the application for leave to appeal succeeds. The applicants do not oppose the conditional cross-appeal.

[3] It is common cause that this is (or in my view, has been litigated into becoming) an "engaging and complex matter", as described by the respondent's counsel. The applicants have raised a series of grounds of appeal. I do not intend traversing them all. The main thrust of the applicants' argument is that this court's judgment was influenced from the outset by its erroneous view that the guarantees referred to in the papers and in oral evidence, were indeed paid. It is contended that this court ought to have found that (a) no valid guarantees were issued, (b) that there was no valid pledge of funds by Cape Concentrate to Standard Bank, (c) that the guarantees were not paid or cancelled by Standard Bank, (d) that Cape Concentrate's funds were used to repay debts owed by Tyefu Trust to the respondent, and (e) that this payment was a disposition without value which serves to be set aside in terms of s 26 of the Insolvency Act 24 of 1936.

[4] It is further contended that this court has procedurally and substantively erred with regard to evidence received and the weight attached thereto, and with respect to the absence of oral evidence which ought to have been tendered by the respondent, and the inferences which ought to have been drawn in that regard.

[5] The respondent contends that the issue of whether this court correctly found that this payment caused Cape Concentrate to receive value within the meaning of s 26 of the Insolvency Act (which is in issue between the parties), is determinative of whether leave to appeal should be granted or not. To this end, the respondent argues that this court did not err in finding that value was received, and that another court ought not to be asked to traverse, which are by all accounts, academic issues which cannot possibly affect the outcome of this court's order. The converse argument, as raised by the applicants' counsel, is that this court cannot find that value was given, if there was no obligation to pay in the first place, which, it is argued, has been the applicants' case all along.

[6] The respondent's conditional cross-appeal suggests that this court erred in not finding that the funds which were paid to the respondent on 8 May 2015, were paid by, or on behalf of, the Standard Bank (as opposed to the Company in liquidation) in terms of the six Standard Bank demand guarantees on behalf of the Tyefu Trust in the respondent's favour, and accordingly did not constitute a disposition by the Company in liquidation.

[7] Both parties have raised a number of issues in this application, none of which appear to have been frivolous. In my view there are reasonable prospects that another court would arrive at a conclusion/conclusions which do not support the views which I have been at pains to express in my judgment. I am accordingly inclined to allow both applications. As for the forum for appeal, I am in agreement with counsel for the applicant, that it should be the SCA. I make the following order:

a. The applicants are granted leave to appeal to the SCA.
b. The respondent is granted leave to cross-appeal to the SCA.
c. The costs of the applications shall be costs in the appeals.

I.T. STRETCH

JUDGE OF THE HIGH COURT

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Date heard: 22 September 2021
Date handed down by way of email to the attorneys: 2 November 2021