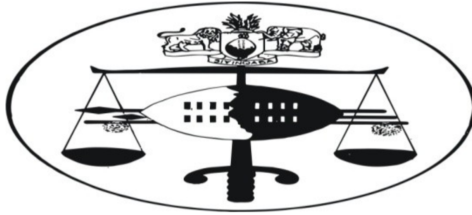

IN THE SUPREME COURT OF SWAZILAND

JUDGMENT

HELD AT MBABANE **CIVIL APPEAL CASE NO: 74 /2015**

In the matter between:

NKONYENI FARMS (PTY) LIMITED	1ST APPLICANT
JOHAN JACOB RUDOLF	2ND APPLICANT
JOHAN JACOB RUDOLF III	3RD APPLICANT

AND

SWAZILAND INDUSTRIAL DEVELOPMENT COMPANY LIMITED	1ST RESPONDENT
LIQUIDATORS OF VALLEY FARM CHICKENS (PTY) LIMITED	2NDRESPONDENT
NGWANE MILLS (PTY) LIMITED t/a FEEDMASTER SWAZILAND	3RDRESPONDENT

KANHYM ESTATES (PTY) LIMITED
4TH RESPONDENT

Neutral Citation: *Swaziland Industrial Development Company Ltd. vs. Nkonyeni Farms (Pty) Ltd and Three Others (74/2015) [2016] SZSC 71 (30th June 2016)*

Coram: **MCB MAPHALALA, CJ**

DR. B.J. ODOKI, JA

M.J. MANZINI AJA

Heard: **03 May 2016**

Delivered: **30 June 2016**

Summary: *Company Law – Application for liquidation and sequestration – Appellants unable to pay debts – Order granted for liquidation and sequestration – Application for clarification of order under Rule 42 (1) (b) of the Rules of the High Court – Application by 2nd, 3rd and 4th Respondents to intervene in the application and apply for appointment of a 3rd liquidator – Admission of documents received during inquiry into the company – Whether documents admissible under Section 352 or 354 of the Companies Act 2009 – Whether court a quo erred in allowing application to intervene – Court a quo clarifying its order to mean provisional sequestration order in order to comply with the requirements of Section 12 of the Insolvency Act 1955 – Whether court a quo erred in not revisiting order for costs –*

Held, court a quo correct to allow application by interveners as they had substantial interest in the proceedings – Court a quo made the clarification of its order to mean provisional liquidation and sequestration order – Court exercised its discretion in not interfering with its order for costs – Appeal dismissed with costs.

JUDGMENT

DR. B.J. ODOKI, JA

[1] The Respondents brought an application before the High Court in terms of Rule 42 (1) of the Rules of the High Court for clarification of an order granted in its judgment dated 20 March 2015, in respect of the ambiguity or omission in the order granted.

[2] The Respondents had brought an application by notice of motion for order under Section 287 of the Companies Act 2009. They sought provisional orders and a rule *nisi* in both the liquidation application and the petition. The order in paragraph [31] of the judgment of the Court *a quo* was that an order for liquidation and sequestration was granted. The Court *a quo* added that the ancillary orders in the Notice of Motion and Petition were also granted. The court did not specifically indicate

that the orders were provisional nor did it frame a rule _nisi_ with a return date in its reference to ancillary orders.

[3] The parties approach and the Court _a quo_ in chambers to clarify the above uncertainty on 2 April 2015.

[4] On the day of the arguments in the above application for clarification, the intervening parties being the liquidators of the 2nd, 3rd and 4th Respondents, applied to be intervene in the proceedings.

[5] The orders sought in the application to intervene were as follows:-

"(1) That Ms. Marisa Box shall-Smith shall be appointed as joint provisional trustee and joint provisional liquidator in the sequestration and liquidation proceedings.

(2) That the estates of Johan Jacob Rudolf and Johan Jacob Rudolf III be provisionally be sequestrated.

(3) That Nkonyeni Farms (Pty) (NF) be finally wound up alternatively, provisionally wound up

> ***(4) That there be an enquiry into the affairs of Nkonyeni Farms (Pty) Ltd (NF) in terms of an enquiry schedule which is attached to the Notice of Motion."***

[6] The court *a quo* allowed the application of interveners to join in the application for clarification of the ambiguous order.

[7] In its judgment dated 23 October 2015, the Court *a quo* rejected the application by interveners to appoint an additional liquidator and trustee. The court agreed to vary its previous order to conform to the strictures of Section 12 of the Insolvency Act.

[8] The Court *a quo* clarified its previous order by making the following order:-

> ***"1. The estates of Johan Jacob Rudolf II are provisionally sequestrated.***
>
> ***2. The Master of the High Court is directed to appoint Sibusiso Motsa as provisional trustee of the Estates of Johan Jacob Rudolf and Johan Jacob Rudolf III.***

3. A rule nisi issues calling upon Johan Jacob Rudolf and Johan Jacob Rudolf III to show cause on 11 December 2015 at 09:30hrs why the following order should not be made:-

3.1 The provisional sequestration of their estates be made final.

3.2 Costs of the Petition be costs in the sequestration of their estates.

4. The order is to be published once in the Swazi Observer and the Times of Swaziland newspapers as well as in the Government Gazette"

[9] The Appellants appealed against the judgment of the High Court on various grounds which I shall deal with in this judgment. The first Respondent also raised a preliminary point of law which I shall deal with first.

[10] The preliminary point of law raised by the 1st Respondent is that in this case an appeal does not lie to this court as of right, except with leave of the court. It was the submission of the Respondent that if the 1st Appellant maintains that the Court *a quo* issued a provisional

liquidation order, this would deprive it the right of automatic appeal that it appears to have arrogated to itself. It was the submission of the first Respondent that this would call for the 1st Appellant to move an application for leave to appeal.

[11] The right of appeal to this court in civil matters is governed by Section 14 (1) of the Court of Appeal 74/1954 which provides as follows:

> ***"14. (1) An appeal shall lie to the Court of Appeal-***
>
> ***(a) From all final judgments of the High Court; and***
>
> ***(b) By leave of the Court of Appeal from interlocutory order, an order made ex parte or an order as to costs only."***

[12] This section has been considered in several decisions of this court including **ROBERT SAMKELO HADEBE vs. NELISIWE NDLANGAMANDLA AND ATTORNEY GENERAL (19/2013) [2013] SZSC 51** (29 November 2013) where this court stated:-

> ***"As is plainly evident from Section 14 (1) of the Court of Appeal Act, the right of appeal is circumscribed. It only***

pertains to a final judgment of the High Court. An appeal from an interlocutory order of the High Court does not lie as a right but by leave of the Court of Appeal.

***It need hardly to be stressed that rescission of default judgment is not a final judgment because the court has not said the last word. It is not definitive. It is as such a simple interlocutory order as laid down in the leading cases of PRETORIA GARRISON INSTITUTES DANISH VARIETY PRODUCTS PTY LTD 1948 (1) SA 839 (A) at 870, SOUTH CAPE CORPORATION (PTY) LTD v. ENGINEERING MANAGEMENT SERVICES (PTY) LTD 1977 (3) SA 539 (A) which have consistently been followed in this jurisdiction in the cases referred to in paragraph [7] above. Accordingly, it is not appealable without leave of the Court of Appe*al. It is common cause that the Appellant has not obtained leave."**

[13] In the present case, the Appellants argue that the Court *a quo* made a provisional sequestration order although they submit that the court failed to make a similar order for liquidation. If the Appellants sought to appeal against a provisional sequestration order they should have sought and obtained leave to appeal against such interlocutory order.

They may have been doubtful whether the Court *a quo* made such order which was not final, but they should have taken precautions to seek leave to appeal which they failed to do. This appeal is therefore incompetent for this reason.

[14] I shall now consider the grounds of appeal. The first ground of appeal is that the Court *a quo* erred in permitting the second, third and fourth Respondents to intervene in an application to clarify an order made in the application for liquidation and sequestration under case numbers 1217/2014 and 1218/14.

[15] The Appellants submitted that the Court *a quo* ought to have dismissed the application to intervene because, in the first place, those Respondents had not sought to be joined in the applications for liquidation and sequestration prior to judgment on those applications. Secondly, those Respondents sought additional orders in their Notice of Motion to intervene which were not permissible in an application in terms of the Rule 42 (1) (b) which merely sought to clarify the order already granted.

[16] The third reason why the Appellants argued that the application to intervene should have been dismissed is that the additional orders

seeking to appoint an additional liquidator and trustee and to establish an enquiry into the affairs of the first Appellant could not be granted in application in terms of Rule 42 (1) (b) as the Court *a quo* was already *functus officio*.

[17] The 2nd, 3rd and 4th Respondents submitted that it is trite law that an application to intervene may be brought at any time even after the judgment pursuant to which the winding up and sequestration orders were granted. Reference was made to Meskin, Insolvency Law paragraph2.1.11 where the principles were summarized as follows:-

(1) At common law a court in its discretion, may permit intervention at any time. This is not limited to the provisions of the Insolvency Act. (See **HETZ vs. EMPIRE ANCHONEER & ESTATE AGENTS 1962 (1) 558 (T) MARITZ MATTERS AND ANOTHER 2002 (1) SA 689 (C)**

(2) An application may be brought at any time.

(3) An application for intervention must show a direct and substantial interest in the proceedings. This is a legal interest which maybe prejudicially affected by any judgment in the proceedings.

(4) Upon granting of a sequestration order or a winding up order a _*concursus*_ _*creditorum*_ comes into existence and any creditor is thus vested with _*locus*_ _*standi*_ to intervene.

(5) The court has a discretion on the grounds of convenience to permit a person who is not a creditor but who _*prima facie*_ has an interest in the sequestration or liquidation proceedings to intervene.

[18] It was therefore the submission of the said Respondents that once the intervening applicants show that they are interested in the winding up or the sequestration they are entitled to seek leave to intervene. It was their contention that the Court _*a*_ _*quo*_ exercised its discretion in their favour which this court should be slow to interfere with.

[19] In its judgment, the Court _*a*_ _*quo*_ also referred to Meskin, Insolvency Law (*supra*) and observed that at common law the court has discretion to permit an application for intervention which may be brought at any time. The court went on to quote the said author as follows:-

> ***"To quote the words of KRAUSE, J., in the case of BITCON vs. CITY COUNCIL OF JOHANNESBURG AND ARENOW BEHRMAN & CO., 1931 W.L.D 273 at pate 293 to 294,***

> ***'----- it is matter entirely within the discretion of the court to allow a party to intervene, provided the intervening party can show that he is specially concerned in the issue, and that the matter is of common interest to himself and the party who desires to join, and that the issues are the same'.***

The Learned Judge then goes to refer to certain authorities and continues.

> ***'----- the Privy Council had to consider our law on intervention and LORD WYNFORD states the law as follows: 'The principle of law of intervention is, that if any third person considers that his interest will be affected by a cause which is pending, he is not bound to leave the care of his interest to either of the litigants, but has a right to intervene or be made a party to the cause, and take on himself the defence of his own rights, provided he does not disturb the order of the proceedings. The intervener may come in at any stage of the case, and even after judgment, if an appeal can be allowed-----".***

[20] The Court *a quo* accepted quite correctly in my view, the argument by the intervening parties that they had showed direct and substantial interest in the proceedings and that their interest may be prejudicially affected by the judgment in the proceedings.

[21] The court was therefore entitled to reject the submission that the intervening parties could not be allowed to join in the proceedings because they were not parties in the proceedings giving rise to the Application.

[22] I am unable to fault the court *a quo* in exercising its discretion in allowing the application by the 2nd, 3rd and 4th Respondents to intervene in the proceedings seeking clarification of the judgment of the Court *a quo.*

[23] The Appellants also contended that the application to intervene ought to have been dismissed because of the additional orders seeking to appoint an additional liquidator and trustee and to establish an inquiry into the affairs of the first Appellant.

[24] The fact that an application is permitted to be brought does not necessarily mean that it has merit. The Court *a quo* in its wisdom dismissed these requests and therefore it is unnecessary for me to deal with them.

[25] I shall now deal with the second ground of appeal. It is stated as follows:-

> ***"2. The Court a quo failed to deal with the application to clarify the order made in respect of the liquidation application and erred in failing to make any order at all in respect of the liquidation of the first Appellant. The only order made by the Court a quo was the provisional order for sequestration in respect of which there was no dispute between the parties. It accordingly remains uncertain as to what order was granted by the court in the application for liquidation of the first Appellant."***

[26] The Appellants submitted that the Court *a quo* only addressed the sequestration order in its order in the application and failed to make an order on the nature of the liquidation order. It was pointed out that the parties had all accepted that the sequestration order was required to be provisional in terms of the provisions of the Insolvency Act.

[27] The Appellants argued that the 1st Respondent now contends that a final order must be taken to be implied. In its attempts to settle this matter the 1st Respondent now insists that there has been a final liquidation and therefore that any matter must go to the liquidator. In paragraph 20 of their heads of arguments the Appellants state,

> ***"20. The Court a quo made an order in the application under Rule 42 but failed to determine whether the liquidation was provisional despite being fully addressed on the need for a provisional order and the advertisement of a rule which has always been the established practice in Swaziland and elsewhere. It is submitted that the court erred on failing to make an order on the liquidation and that this Honourable court should substitute the order made with an order which includes a provisional liquidation order. This is the appropriate order on the application which was before the court but which the court failed to address. The application which was before the court was for a provisional order and the court erred in failing to make that order"***

[28] The 1st Respondent submitted that it is clear that the Court *a quo* had issued final liquidation and sequestration orders in terms of the judgment of 20 March 2015. It was maintained that that variation made in terms of Rule 42 (1) (b) infers that the initial order was a final one.

[29] The 1st Respondent further argued that the Court *a quo* did not find it necessary to interfere with the final liquidation order and the omission to expressly mention this possibility arose from the distraction of the concentration of the argument on the intervention aspect which dominated the proceedings in the Court *a quo*.

[30] It was the contention of the 1st Respondent that it is not clear what relief the 1st Appellant desires from this court as the status of the order of the Court a quo can only be clarified by the Court a quo and not this court. The1st Respondent relied on the cases of **UNIVERSITY OF SWAZILAND vs. PERCY NDLANGAMANDLA AND FOUR OTHERS** Civil Case No 10/2008 and **EZISHINENI KANDLOVU vs. NDLOVUNGA DLAMINI AND ANOTHER (58/2012) [2012] SZSC 51**(30 November 2012).

[31] The intervening Applicants submitted that they have made it clear that it does not matter to them whether their winding up order should have been provisional or final. They argued that the Companies Act does not contain an equivalent provision to Section 10 of the Insolvency Act which stipulates for a provisional sequestration order that may or may not be confirmed on return.

[32] The interveners also argued that a court hearing an application for a winding up has a discretion and is empowered to grant a provisional order or a final order. Whilst the convention in this country might be to be granted a provisional order, it was contended, this does not detract from the fact that it is a matter for the exercise of a discretion by the judge hearing the application.

[33] It was submitted by the interveners that Section 290 of the Companies Act provided simply that upon a hearing of the matter ***"the court may grant or dismiss any application under Section 289 ----- or make any interim order or any other order it may deem fit".***

[34] Section 42 of the Rules of the High Court provides:-

"(1) The court may in addition to any other powers it may have mero molu upon the application of any party affected, rescind or vary:

> ***(b) an order or judgment in which there is an ambiguity or a patent error or omission, but only to the extent of such ambiguity, error or omission.***
>
> ***(c) an order or judgment granted as a result of a mistake common to the parties.***

(2) Any party desiring any relief under this rule shall make an application thereof, upon notice to all parties whose interests may be affected by any variation sought.

(3) The court shall not make any order rescinding or varying any order or judgment unless satisfied that all parties whose interests may be affected have notice of the order".

[35] Having listened to the arguments of the parties, the Court *a quo* issued a clarification of the order to conform to the requirements of Section 12 of the Insolvency Act, as follows:

"[62] However, it is contended for the Defendant at paragraph 30 of its Answering Affidavit that the pursuit of the first order by SIDC in the sequestration petition was not undertaken in accordance with Section 12 of the Insolvency Act. In other words, the attorney for the Respondent was not alive to the statutory requirement of provisional sequestration.

[63] In paragraph 31 thereof it is contended for the Respondent that even if the court would maintain that it granted a final order of sequestration, SIDC would abandon it in favour of provisional order for purposes of compliance with Section 12 of the Insolvency Act. As the Rudolphs contended in their Founding Affidavit deposed to on their behalf, SIDC has no objection to a provisional sequestration order in compliance with Section 12 of the Insolvency Act.

[64] In view of the above arguments by the Respondents in paragraphs [62] and [63] this court is obliged to vary the order it has issued to conform to strictures of Section 12 of the Insolvency Act. Without doing

that the order initially given by this court for a final order is tainted with illegality and of no consequency."

[36] It is clear that the Court *a quo* made a clarification that the order made should be varied from a final order to a provisional order to comply with Section 12 of the Insolvency Act which can be invoked only after an order *nisi* has been issued and the matter advertised in terms of Section 10 and 11 of the Insolvency Act.

[37] Consequently the Court *a quo* issued a provisional sequestrated order in paragraph [20] of its judgment which order was to be published in the **Swazi Observer** and ***The Times of Swaziland*** newspapers as well as in the ***Government Gazette***.

[38] In my view the Court *a quo* made the clarification sought the effect of which both parties indicated they would be comfortable with a provisional order. It is not clear therefore why this appeal was made.

[39] If the Appellants were not satisfied with the order made by the Court *a quo*, they should have sought the clarification or variation from the same court, and not to do so from this court. I therefore find no merit in this ground of appeal.

[40] The third and fourth grounds of appeal were stated as follows:

> ***"3. The Court a quo erred in its interpretation of Sections 352, 354 and 355 of the Companies Act, 2009 and failed to take into account Section 39 of the Insolvency Act, 1955 with regard to an enquiry in terms of Section 352 of the Companies Act, 2009. The Court a quo accordingly erred in its findings in paragraph [46] and related paragraphs of the judgment by finding that enquiry into the affairs of Valley Farm Chickens is a public one in terms of Section 352. In so finding the Court a quo erred in holding that the documents and evidence relied upon the intervening applicants were admissible.***
>
> ***4. The Court a quo erred in its findings on the application to strike out and/or failed to make***

rulings in respect of the application. The Court a quo failed in particular to have regard to grounds for the striking out of paragraphs which were scandalous and vexatious and paragraphs which were irrelevant."

[41] In view of the decision of the Court *a quo* dismissing the orders requested by the interveners, and in view of the fact that, these grounds were irrelevant to the application for clarification of the court order, I do not find it necessary to consider them.

[42] The last ground of appeal related to the failure to award costs against the interveners. It was framed as follows:

> ***"5. The second to fourth respondents, having been permitted to intervene, did not persist in their application for an enquiry and did not succeed in obtaining an order for the appointment of an additional liquidator and trustee. In the premises the second to fourth respondents ought to have been ordered to pay the costs of the appellants in***

the Court a quo. The Court a quo erred in failing to consider or address the question of costs at all."

[43] Award of costs is in the discretion of the trial court. The Court *a quo* made an order that the costs of the petition be costs in the sequestration of their estates. I find no sound reason to interfere with the discretion exercised by the Court *a quo* in the award of costs.

[44] Consequently, I find no merit in this appeal which should fail.

[45] I make the following order:

(a) The appeal is dismissed.

(b) The orders of the High Court are confirmed.

(c) Costs of this appeal will be costs in the liquidation and sequestration of the estates of the Appellants.

____

DR. B.J. ODOKI

JUSTICE OF APPEAL

I agree

____

MCB MAPHALALA

CHIEF JUSTICE

I agree

____

M. J. MANZINI

ACTING JUSTICE OF APPEAL

FOR THE APPELLANTS: **ADV. P. E. FLYNN**

FOR 1ST RESPONDENT: **S.K. DLAMINI**

FOR 2ND, 3RD & 4TH RESPONDENTS: **G.I. HOFMAN**