CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 116/2009
[2011] ZACC 12

In the matter between:

CHERANGANI TRADE & INVEST 107 (PTY) LTD	Applicant
and	
ALAN CLIFFORD MASON N.O.	First Respondent
JAMES CLIFFORD MASON N.O.	Second Respondent
THOMAS ALAN MASON N.O.	Third Respondent
TRUSTEES IN THE INSOLVENT ESTATE OF ALAN CLIFFORD MASON	Fourth Respondent
GILL EGREMONT MASON	Fifth Respondent

Heard on : 15 March 2011

Decided on : 8 April 2011

JUDGMENT

YACOOB J:

Introduction

[1] This is an application for leave to appeal against an order of the Free State High Court[1] (High Court) in circumstances where leave to appeal was refused by both the High Court[2] and the Supreme Court of Appeal.[3] The applicant seeks to challenge the correctness of part of an order made by the High Court in terms of section 89(5)(c)[4] of

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[1] *Cherangani Trade and Investment 107 (Edms) Bpk v Alan Clifford Mason N.O. and Others*, Case No. 6712/2008 & 287/2009, Free State High Court, Bloemfontein, 12 March 2009, unreported.

[2] 14 August 2009.

[3] 17 November 2009.

[4] The High Court issued an order in the folowing terms:

> "A. Ten opsigte van aansoeknommer 6712/2008:
>
> 1. Respondente word gesamentlik en afsonderlik gelas om die verkwiste koste veroorsaak deur die uitstel op 13 November 2008, te betaal.
>
> 2. Die applikant word gelas om die verkwiste koste veroorsaak deur die uitstel op 4 Desember 2008, te betaal.
>
> 3. Die eerste tot derde respondente word gelas om die verkwiste koste van die applikant en vierde respondent veroorsaak deur die uitstel op 22 Januarie 2009, te betaal.
>
> 4. Die eerste, tweede en derde respondente word gelas om die bedrag van R34 358,76 met rente bereken teen 15,5% per jaar vanaf 30 September 2008 tot datum van betaling aan die applikant te betaal.
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> 5. 5.1 In terme van die bepalings van artikel 89(5)(a) van Wet 34 van 2005 word die 'leningsooreenkoms en erkenning van skuld' synde aanhangsel 'CB8' en die 'koopooreenkoms' wat daarmee saamgaan, synde aanhangsel 'CB9' tot die aansoek, in soverre dit betrekking het op die vierde respondent, sowel as die lenings onderliggend aan die bedrae gevorder in smeekbede 6 van die Kennisgewing van Mosie nietig verklaar *ab initio*.
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> 5.2 In terme van die bepalings van artikel 89(5)(c) word al die applikant se regte om enige betaling of vergoeding van vierde respondent te verhaal aan die Staat verbeurd verklaar.
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> 6. Origens word die aansoek afgewys en applikant word gelas om die koste van die aansoek te betaal.
>
> 7. 'n Afskrif van hierdie uitspraak moet aan die Nasionale Kredietreguleerder voorsien word.
>
> B. Ten opsigte van aansoek 287/2009:
>
> 1. Die eerste, tweede en derde respondente, synde applikante in die aansoek, word gelas om die koste van die aansoek te betaal."

the National Credit Act[5] (Credit Act). The High Court declared all the applicant's rights against the fourth respondent in terms of an agreement of loan, an agreement of sale as well as agreements in terms of which certain small loans had been advanced to and certain obligations incurred by the first, second, third and fourth respondents forfeit to the state. I will refer collectively to all of them as agreements.

[2] The first three respondents entered into these agreements as trustees acting on behalf of the Selous Estate Property Trust (Trust) and have not contested these proceedings. The estate of the fourth respondent was sequestrated after he had already opposed this application. The estate is now represented by trustees in insolvency who will be substituted as the fourth respondent. I will refer to these trustees as the respondent. The fifth respondent had been married to the fourth respondent and was joined in the proceedings on account of any interest she might have had in them. She took no part in the proceedings however.

[3] The applicant contends that:

(a) The High Court was wrong in holding that it was obliged by section 89(5)(c) to make the order;

(b) The High Court should have held that it had a discretion whether to make the order;

[5] 34 of 2005.

(c) The discretion ought to have been but was not exercised by the High Court; and

(d) The order should be set aside and the matter referred to the High Court to enable it to exercise its discretion as required by the section.

[4] The respondent supports the order of the High Court.

Background

[5] The Trust and the fourth respondent borrowed an amount in excess of R2 million from the applicant to satisfy a judgment debt. The judgment had been taken against the Trust and the fourth respondent for a debt that had been secured by mortgage bonds over certain farms. A number of agreements were entered into shortly before the farms subject to the mortgage were about to be sold in execution. A loan agreement provided for the repayment of the loan and the consequences of its non-payment. The sale agreement stipulated amongst others for the sale of three farms, one owned by the Trust and two owned by the fourth respondent, to the applicant at a price equal to the loan if there was non-compliance. Suffice it to say that the terms of the agreements were onerous indeed. For example, an amount of R250 000 was payable as consideration for the conclusion of the agreements and the interest, after four months of interest-free indebtedness, when the principle amount would become due, would be 30% per annum.

[6] The Trust defaulted and this triggered an application by the applicant for certain orders aimed at facilitating the enforcement of the agreements. The High Court order was made in this application.

The application for leave to appeal

[7] No authority is now needed for the proposition that this Court will grant an application for leave to appeal only if the appeal raises a constitutional matter or an issue connected with a decision on a constitutional matter, and if it will be in the interests of justice to grant it. I address each question.

Constitutional matter?

[8] The case does raise a constitutional matter. The applicant's contention was in essence that, if read in the light of section 25(1) of the Constitution which prohibits arbitrary deprivation of property, section 89(5)(c) can and ought to be interpreted in line with section 39(2) of the Constitution so as to afford a court a discretion whether to make the forfeiture order. The applicant urged that, absent a discretion, the section would result in disproportionate forfeitures which would constitute arbitrary deprivation of property. The construction favoured by the applicant, so it was submitted, would avoid this unconstitutional consequence. The interpretation of a forfeiture provision that might give rise to arbitrary deprivation of property raises a constitutional matter. Deciding whether granting leave to appeal is in the interests of justice is more complex, however.

Interests of justice?

[9] The applicant contends that this case raises issues of public interest and importance concerning the interpretation of section 89(5)(c). It emphasises the urgent need to ensure, in the interests of the general public and the credit market, that forfeitures amounting to arbitrary deprivations of property should not occur. The applicant also urges that there are prospects of success in the appeal.

[10] The respondent takes issue in relation to the prospects of success but go further. They charge, and the applicant admits, that the matters sought to be advanced in this Court were never raised in the High Court. They also contend that if the meaning favoured by the applicant is embraced by a court, the state interest in securing a forfeiture order would be detrimentally affected in all future cases concerning forfeiture. It is therefore, according to the Trustees, fatal to the application for leave to appeal that the Minister for Finance is not before the Court.

[11] The applicant implores that the decision by this Court should not be based on attaching blame to it for issues not raised and non-joinder. I accept that this Court should not decide this case on that basis.

[12] The discretion and proportionality issues are not raised for the first time before this Court. They were pertinently addressed in the application for leave to appeal to the Supreme Court of Appeal. That however is beside the point. The real difficulty is that in

the light of the fact that the application for leave to appeal was refused by the Supreme Court of Appeal without reasons, this Court will in effect be a court of first and last instance in the determination of the issue before us. And the issue is a complex one concerned with fairness and justice in the credit market in the context of rights in our Constitution. This Court, if it grants the application for leave to appeal, would be deprived of the wisdom and expertise of the judgments of the High Court and the Supreme Court of Appeal. This Court would also not benefit from the continued reflection that is an important ingredient of the appeal process, in relation to the issues now sought to be raised. Moreover, I do not know of nor were we referred to any case in any other court on this important and difficult matter.

[13] These considerations are underscored by the fact that it will not be easy to give a comprehensible meaning to the forfeiture provision. Section 89(5) provides:

> "(5) If a credit agreement is unlawful in terms of this section, despite any provision of common law, any other legislation or any provision of an agreement to the contrary, a court must order that—
>
> (a) the credit agreement is void as from the date the agreement was entered into;
>
> (b) the credit provider must refund to the consumer any money paid by the consumer under that agreement to the credit provider, with interest calculated—
>
> (i) at the rate set out in that agreement; and
>
> (ii) for the period from the date on which the consumer paid the money to the credit provider, until the date the money is refunded to the consumer; and

(c) all the purported rights of the credit provider under that credit agreement to recover any money paid or goods delivered to, or on behalf of, the consumer in terms of that agreement are either—

(i) cancelled, unless the court concludes that doing so in the circumstances would unjustly enrich the consumer; or

(ii) forfeit to the State, if the court concludes that cancelling those rights in the circumstances would unjustly enrich the consumer."

[14] Section 89(5) read with section 89(2)(d)[6] buttressed by section 40(4)[7] of the Credit Act provides that a court must declare credit agreements concluded by credit providers

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[6] Section 89(2)(d) of the Credit Act provides:

"(2) Subject to subsections (3) and (4), a credit agreement is unlawful if—

(d) at the time the agreement was made, the credit provider was unregistered and this Act requires that credit provider to be registered".

[7] Section 40 of the Credit Act provides:

"Registration of credit providers

40. (1) A person must apply to be registered as a credit provider if—

(a) that person, alone or in conjunction with any associated person, is the credit provider under at least 100 credit agreements, other than incidental credit agreements; or

(b) the total principal debt owed to that credit provider under all outstanding credit agreements, other than incidental credit agreements, exceeds the threshold prescribed in terms of section 42(1).

(2) In determining whether a person is required to register as a credit provider—

(a) the provisions of subsection (1) apply to the total number and aggregate principal debt of credit agreements in respect of which that person, or any associated person, is the credit provider;

(b) each associated person that is a credit provider in its own name and falls within the requirements of subsection (1) must apply for registration in its own name;

(c) a credit provider that conducts business in its own name at or from more than one location or premises is required to register only once with respect to all of such locations or premises; and

(d) 'associated person'—

(i) with respect to a credit provider who is a natural person, includes the credit provider's spouse or business partners; and

(ii) with respect to a credit provider that is a juristic person, includes—

who have not been registered under the Act void. This may mean that neither rights nor obligations can flow from these agreements, except perhaps the right to make a claim based on unjust enrichment. Section 89(5)(c) goes on to provide for the forfeiture of "purported rights" to payment of money or delivery of goods to be taken away from the credit provider and, if the consumer would be unjustly enriched by this, to be forfeited to the state. It is difficult to fathom exactly what is taken away from the applicant and exactly what is forfeited to the state. Are they "purported rights" which do not exist anymore or is the right to sue for unjust enrichment also forfeited? I return to this in another context.

(aa) any person that directly or indirectly has a controlling interest in the credit provider, or is directly or indirectly controlled by the credit provider;

(bb) any person that has a direct or indirect controlling interest in, or is directly or indirectly controlled by, a person contemplated in clause (aa); or

(cc) any credit provider that is a joint venture partner of a person contemplated in this subparagraph.

(3) A person who is required in terms of subsection (1) to be registered as a credit provider, but who is not so registered, must not offer, make available or extend credit, enter into a credit agreement or agree to do any of those things.

(4) A credit agreement entered into by a credit provider who is required to be registered in terms of subsection (1) but who is not so registered is an unlawful agreement and void to the extent provided for in section 89.

(5) A person to whom this section does not apply in terms of section 39, or who is not required to be registered as a credit provider in terms of this section, may voluntarily apply to the National Credit Regulator at any time to be registered as a credit provider.

(6) When determining whether, in terms of subsection (1), a credit provider is required to register—

(a) the value of any credit facility issued by that credit provider is the credit limit under that credit facility; and

(b) any credit guarantee to which a credit provider is a party is to be disregarded."

[15] These complexities lend additional force to the contention that the issue must not be determined without effective and meaningful participation by the Minister for Finance. It may well be necessary for the state to explain the context and background of the provision, and put up a commercially sensible market related explanation that will impact on whether, if the measure does give rise to disproportionality, it can be justified in all the circumstances. The state has a legitimate interest in curbing the scourge of irresponsible borrowing and lending, and it may be that a measure of disproportionality is the appropriate cost for the achievement of this laudable objective.

[16] I do not suggest that every interpretation of a statute requires the state to be joined. It must be accepted that the state has the right to be joined if it has a direct and substantial interest.[8] I accept that a mere financial interest is not enough.[9] What is in issue in this case is a forfeiture penalty, which, if made by a court, would entitle the state to a right to recover, in which case the state has a direct and substantial interest. The conclusion of this judgment is that the state, in this case, has a direct and substantial interest because the interpretation of the nature and reach of the forfeiture clause could affect the right to forfeiture enjoyed by the state in every future case involving section 89(5)(c).

[8] See *Minister of Public Works and Others v Kyalami Ridge Environmental Association and Another (Mukhwevho Intervening)* [2001] ZACC 19; 2001 (3) SA 1151 (CC); 2001 (7) BCLR 652 (CC) at para 30.

[9] *United Watch & Diamond Co. (Pty.) Ltd. and Others v. Disa Hotels Ltd. and Another.* 1972 (4) SA 409 (C) at 415G-H.

[17] These considerations are in themselves sufficiently cogent to justify the refusal of the application for leave to appeal.

[18] There is however another angle. The High Court effectively disposed of the question whether the provision is mandatory in one sentence which I would translate as follows: "It was not argued on behalf of the applicant that the provisions of that section are not mandatory and it seems, at first glance, to be a mandatory provision."[10] The forfeiture order was made without any investigation of its meaning or its purpose. This means that it was unclear precisely what was forfeited. Did the forfeiture order deprive the applicant of the right to claim unjust enrichment or only to the rights to claim payment of money or delivery of goods in terms of or under the agreements concerned? And the lack of clarity is significant.

[19] Neither counsel could tell us what the provision meant and their submissions tended to go sometimes in one direction and sometimes in another. The uncertainty creates the real possibility that the estate of the fourth respondent may ultimately benefit from agreements with an unregistered credit provider. This is because the respondent could conceivably—

[10] See above n 1 at para 37 of the High Court judgment which reads:

> "Dit is nie namens die applikant geargumenteer dat die bepalings van daardie artikel nie gebiedend is nie en blyk dit op die oog af 'n gebiedende bepaling te wees."

(a) in an action by the state to recover money pursuant to the rights that have been forfeited to it, plead that the rights that the state had were only purported rights and that the state accordingly has no claim; and

(b) in an action by the applicant on the basis of unjust enrichment, plead that the right to make this claim too had been forfeited to the state.

[20] And if the estate of the fourth respondent succeeds, it could be the beneficiary of unlawful agreements. It is arguable that this could not have been contemplated by the legislature. The parties may at least be entitled to know the meaning and consequences of an order of forfeiture once it is made, and I think it may not be appropriate for a court to grant an order stipulated by legislation without investigating its meaning, purpose and consequences.

[21] There is an added difficulty. The forfeiture order as translated by me says "In terms of the provisions of section 89(5)(c), all the applicant's rights to obtain any payment <u>or compensation</u> from fourth respondent are declared forfeited to the state."[11] (Emphasis added.) Now it will be remembered that section 89(5)(c) does not refer to compensation at all. It refers to forfeiture of the rights to payment of money or delivery of goods. It seems to me that it is possible that the order may have been wrongly made.

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[11] See above n 1 at para 5.2 of the High Court order which reads:

> "In terme van die bepalings van artikel 89(5)(c) word al die applikant se regte om enige betaling of vergoeding van vierde respondent te verhaal aan die Staat verbeurd verklaar."

[22] I may summarise the position as follows. On the one hand the fact that the case raises a constitutional issue of public importance and the difficulties in relation to the High Court order point to the interests of justice requiring that leave to appeal be granted. On the other hand factors that point strongly in the opposite direction are that it is undesirable for this Court to be a court of first and last instance[12] and that the relevant state entity has not been joined.

[23] A circumstance that I have not yet mentioned does, however, decidedly tilt the scales against the applicant. The applicant has given no particulars of the extent to which it will be prejudiced by the High Court order or any basis upon which the High Court, if the case is referred back to that Court, could find for the applicant. In other words, the applicant has not established even a reasonable possibility that it will benefit from a referral to the High Court. Applicant's counsel relies on the notional possibility that the exercise of a discretion by the High Court might well produce a different result. I must accept that a possibility of this kind does exist in theory, but conclude that this would not have been enough to justify a referral to the High Court even if it had been held that the High Court had a discretion.

[12] *Billiton Aluminium SA Ltd t/a Hillside Aluminium v Khanyile and Others* [2010] ZACC 3; 2010 (5) BCLR 422 (CC) at para 21; *Lane and Fey NNO v Dabelstein and Others* [2001] ZACC 14; 2001 (2) SA 1187 (CC); 2001 (4) BCLR 312 (CC) at para 5; *National Gambling Board v Premier, KwaZulu-Natal, and Others* [2001] ZACC 8; 2002 (2) SA 715 (CC); 2002 (2) BCLR 156 (CC) at para 29 and *Bruce and Another v Fleecytex Johannesburg CC and Others* [1998] ZACC 3; 1998 (2) SA 1143 (CC); 1998 (4) BCLR 415 (CC) at paras 7-8.

[24] It may be that the applicant might ultimately lose more than R2 million. But we do not know the full extent of that loss nor its relative impact on the applicant's pocket. The lack of information about the relative impact on the applicant, of what might or might not be a sizable loss, is relevant to the interests of justice. The papers disclose no facts about this. This gap counts against accommodating the applicant by hearing its case.

[25] And what is more, it cannot be said that the parties have no other right of recourse. The applicant could well claim some kind of restitutionary relief against the estate of the fourth respondent and the state might claim money from the estate consequent upon forfeiture to it. The troublesome features that have been mentioned earlier in this judgment could be resolved in those proceedings, if they are launched.

[26] The application for leave to appeal must therefore be refused.

Costs

[27] There is no reason why, as the parties agreed, costs should not follow the result.

Order

[28] The following order is made:

1. The Trustees in the insolvent estate of Alan Clifford Mason are substituted for Alan Clifford Mason as the Fourth Respondent.

2. The application for leave to appeal is dismissed with costs, including the costs of two counsel.

Ngcobo CJ, Moseneke DCJ, Cameron J, Froneman J, Jafta J, Khampepe J, Mogoeng J, Mthiyane AJ, Nkabinde J and Van der Westhuizen J concur in the judgment of Yacoob J.

For the Applicant:	Advocate G Marcus SC and Advocate S Budlender instructed by EG Cooper and Majiedt Attorneys.
For the Fourth Respondent:	Advocate Q Pelser SC and Advocate NC Hartman instructed by Mathys Krog Attorneys.