REPORTABLE

CASE NO: SA 5/2008

IN THE SUPREME COURT OF NAMIBIA

In the matter between

ERIC KNOUWDS N.O.

(In his capacity as Provisional Liquidator of

Avid Investment Corporation (Pty) Ltd. **APPELLANT**

and

NICOLAAS CORNELIUS JOSEA **FIRST RESPONDENT**

HEDWICHT JOSEA **SECOND RESPONDENT**

Coram: Shivute, CJ, Strydom, AJA *et* Mtambanengwe, AJA

Heard on: 2010/03/10

Delivered on: 2010/09/14

APPEAL JUDGMENT

STRYDOM, AJA:

1] The appellant, in his capacity as provisional liquidator of Avid Investment Corporation (Pty) Ltd. (Avid) obtained, on an urgent basis, and without notice,

a provisional sequestration order of the estate of the first respondent. From the very beginning things went wrong. It was not brought to the attention of the Judge who heard the application that, because no notice was given of the application to the first respondent, the application documents were not served on the first respondent prior to the application being moved with the result that the Court only gave instructions for the service of its order. This was further aggravated by the fact that the Court was requested to order service thereof as if the first respondent was a private company. Consequently it was ordered that the provisional sequestration order be served by two publications in newspapers and that it be served on the *registered address* of the first respondent, which was of course non-existent. A further problem was that the first respondent was married in community of property to the second respondent and she was not joined in the application. This necessitated a later application to join the second respondent in the sequestration proceedings. (See *Michalow NO v Premier Milling Co Ltd,* 1960 (2) SA 59 (WLD) at 63C and *P De V Reklame (Edms) Bpk v Gesamentlike Onderneming van SA Numismatiese Buro (Edms) Bpk en Vitaware (Edms) Bpk,* 1985 (4) SA 876 (KPA) at 879I to 880A). This was done and she featured thereafter as the second respondent.

2] The result of all this is that the respondents denied ever having been served with either the application documents or sequestration order and the first respondent alleged that he only became aware of the proceedings when he

read about the order in the newspapers. Thereafter his legal practitioner, through his own endeavour, obtained and made copies of the documents filed in Court. When the matter came before Court for a final order the respondents took the point that there was non-compliance with the Rules of the Court in that the application and order were never served on them. The Court *a quo* concluded that the non-compliance was such that it could not condone it and discharged the provisional sequestration order on that ground and it further ordered that costs be paid on a scale as between attorney and client. This then led to an appeal against the whole judgment and the order of costs issued by the Court *a quo.*

3] It is necessary to give a short background history of the run of events which led to the sequestration proceedings. During 2005 the Social Security Commission, a State Owned Enterprise, transferred an amount of N$30m to a private company, Avid, for investment on its behalf. Avid, which seemed to have been managed by one Kandara, in turn paid over to another company N$29,5m of this amount on certain conditions. This company was Namangol Investments (Pty) Ltd (Namangol). The Managing Director of Namangol, and who was also its *alter ego* according to the Court *a quo*, was the first respondent. One of the conditions on which the money was entrusted to Namangol was that an amount of N$20m was to be invested with one Alan Rosenberg, an investor operating in Johannesburg, Republic of South Africa.

4] When Avid could not come up with the money of the Social Security Commission, when that became due, steps were taken and Avid was provisionally liquidated and the appellant, together with two others, were appointed as liquidators in the estate. The other two liquidators have since resigned. In an attempt to trace the money paid to Avid by the Social Service Commission, an enquiry was held in terms of the provisions of sec 471 of the Companies Act, Act 61 of 1973, before a Judge of the High Court. From Avid the trail led to Namangol and the first respondent. In evidence, given to the Judge who was the chairperson of the enquiry, certain irregularities were discovered concerning the investment of the Social Security Commission which led to the first respondent being charged with theft and fraud, and as a further result of which he was arrested and placed in custody. Simultaneously with the enquiry, applications were launched for the liquidation of Namangol and the sequestration of the first respondent. A final order of liquidation was granted in the matter of Namangol on 27 May 2008 notwithstanding opposition by the latter. As previously stated, the respondents opposed the granting of a final sequestration order *inter alia* on the grounds of the procedural irregularity and was successful in that the Court *a quo* discharged the provisional order of sequestration.

5] Mr. Corbett appeared for the appellant and Mr. van Rooyen for the respondents. Both counsel also appeared in the Court *a quo* during the enquiry into the commercial transactions of Avid and they were well acquainted

with the background history of this matter.

6] At the hearing of the appeal Mr. Corbett invited the Court to also hear the appeal in regard to the merits of the sequestration order. Counsel submitted that an appeal lies against the order of a Court and not against the reasons and because the finding of the Court *a quo* resulted in the discharge of the provisional sequestration order he submitted that he was entitled to argue the merits of his application. This was opposed by Mr. van Rooyen who submitted that only the issue of the non-service of the application was before us on appeal.

7] The Court declined the invitation by Mr. Corbett and limited counsel to the issue decided by the Court *a quo,* namely the finding that, because of the non-service of the application on the respondents, the process amounted to a nullity which it could not condone and discharged the provisional order. Because the Court declined to hear the appeal on the merits as far as the sequestration order was concerned the point was raised by Mr. van Rooyen whether the appellant could appeal as of right and whether, at the very least, it should not have applied for leave to appeal to this Court.

8] Regarding this Court's refusal to deal with the merits of the sequestration order it must be pointed out that the Court *a quo,* in its judgment, only dealt with the

point taken *in limine*, i.e. the non-service issue. It did not express any opinion on the merits or the demerits of the sequestration order and was at pains to point out that the discharge of the provisional sequestration order was as a result of the non-service of the application on the respondents. If this Court was to hear argument and to decide whether a final order of sequestration was to be issued, or not to be issued, it would have done so in first instance and would have had to exercise the discretion with which the High Court, granting or refusing sequestration orders, is clothed. (See in this regard *Epstein v Epstein,* 1987 (4) SA 606 (CPD) at 612G. See also *Davidson v Honey,* 1953 (1) SA 300 (AD) and *Neethling v Du Preez and Others,* 1995 (1) SA 292.) However, before we would even get that far, it was indicated by Mr. van Rooyen that he also intended to take a number of further points *in limine* as far as the provisional sequestration order was concerned. Furthermore counsel also intended to apply for the striking out of various paragraphs, or parts thereof, set out in the sequestration application. All these further points *in limine* and the extensive application for the striking off was set out and foreshadowed in Mr. van Rooyen's heads of argument. If this Court had accepted the invitation by Mr. Corbett to deal with the merits of the sequestration order it would have become embroiled in various issues as a Court of first instance and where it did not have the benefit of the pronouncement, on these issues, by a Court of first instance. Mr. Corbett relied on the case of *S v Malinde and Others,* 1990 (1) SA 57 (SCA) for the submission that the Court should also hear the merits of the sequestration

application. In that matter the Appeal Court decided that, although there was no provision in its Rules for such an order, the Court did have the inherent power to regulate its procedures in the interests of the proper administration of justice and that it would be proper to hear certain special entries separately from the merits of the appeal notwithstanding the fact that that would have resulted in the appeal being heard piecemeal. The Court decided to do so because of considerations of convenience and because the advantages of such a hearing outweighed the disadvantages in the light of the magnitude of the trial. The Court, *inter alia,* considered the fact that the special entries were cogent and, if successful, that would probably have been the end of the matter. The Court found that the circumstances were exceptional and ordered separate hearing of the special entries. None of these circumstances are present in the appeal before us, and nor was the Court in the *Malinde* matter called upon to determine factual and other issues in regard of which there had been no decision by the Court of first instance. What Mr. Corbett wanted this Court to do falls outside the ambit of merely regulating the procedure of this Court.

9] Although I agree with Mr. Corbett that an appeal lies against the order of the Court *a quo,* it is the reasons of the Court which contain the *ratio decidendi* of that Court and which explain and motivate the order. In order to decide the appealability of the Court's order, this Court must determine what the order is about and to do that it is necessary to look at the reasons for the order.

10] Consequently it is necessary to determine if the order of the Court *a quo* was appealable with or without leave of that Court or at all. Sec. 18(1) of Act 16 of 1990 grants a right of appeal against all judgments and orders of the High Court to the Supreme Court. Similar provision is made in sec. 14(1) of the Supreme Court Act, Act 15 of 1990. This Court has, with approval, accepted the meaning ascribed to the words "judgment or order" set out in the case of *Zweni v Minister of Law and Order,* 1993 (1) SA 523 (AD) at 523I (See *Aussenkehr Farm (Pty) Ltd v Minister of Mines and Energy,* 2005 NR 21 (SC)). Generally speaking the attributes to constitute an appealable judgment or order are threefold, namely, the decision must be final, be definitive of the rights of parties or must have the effect of disposing of at least a substantial portion of the relief claimed in the main proceeding. In terms of sec. 18(3) of the High Court Act interlocutory orders are not appealable as of right and need the leave of that Court or, if that was refused, the leave of the Chief Justice, given by him on petition, to be able to come on appeal.

11] It is in my opinion clear that the decision by the Court *a quo* was neither final nor was it definitive of the rights of the parties nor did it have the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings. The basis on which the Court *a quo* discharged the provisional order was procedural in nature and could be corrected by the appellant by simply correcting its failure to serve the sequestration proceedings on the

respondents. For that purpose it could even do so by serving the same application documents. I agree with Mr. van Rooyen that, because of the finding of the Court *a quo*, an issue such as *res judicata* cannot be raised in those circumstances. (See *African Wanderers Football Club (Pty*) *Ltd v Wanderers Football Club,* 1977 (2) SA 38 (AD)). This is a further indication that the Court did not finally dispose of the rights of the parties.

12] In the matter of *Moch v Nedtravel (Pty) Ltd t/a American Express Travel Service* 1996 (3) SA 1 (AD) the Court recognized that there were instances which did not fit the mould set out in *Zweni's* case but where the effect of the Court's finding might be final and definitive of the rights of the parties. These instances, which are of a final bearing on the rights of the parties, are such that they are not interlocutory orders and are appealable as of right. However, for the same reasons set out above, the order of the Court *a quo* was in my opinion not final and therefore not appealable in this instance.

13] There is further the rule against piecemeal appeals which, in my opinion applies to the present proceedings. If, in this instance, the court should now allow the appeal and refer the matter back to the Court *a quo*, further appeals may result, even before the merits of the sequestration are considered. If the appeal is not allowed the appellant could, because of the nature of the proceedings, start proceedings afresh, in which case this situation may repeat itself. In the latter instance the decision of this Court would only be of

academic interest. The Court will not decide issues which are academic, abstract or hypothetical. (See in this regard *Mushwena v Government of the Republic of Namibia and Another (2),* 2004 NR 94 (HC) at 102.) In the matter of *Guardian National Insurance Co Ltd v Searle NO,* 1999 (3) SA 296 (SCA), the appellant was granted leave to appeal to the Supreme Court of Appeal after the Judge in first instance made certain rulings as to how the issue of damages should be calculated, without deciding the issue of damages. On appeal the following was stated by Howie, JA, at p. 301B – D:

> "As previous decisions of this Court indicate, there are still sound grounds for a basic approach which avoids the piecemeal appellate disposal of the issues in litigation. It is unnecessarily expensive and generally it is desirable, for obvious reasons, that such issues be resolved by the same Court and at one and the same time. Where this approach has been relaxed it has been because the judicial decisions in question, whether referred to as judgments, orders, rulings or declarations, had three attributes. First, they were final in effect and not susceptible of alteration by the court of first instance. Secondly, they were definitive of the rights of the parties, for example, because they granted definitive or distinct relief. Thirdly, they had the effect of disposing of at least a substantial portion of the relief claimed."

Further, on page 301, pa. F, the Court stated, in regard to the first attribute, as follows:

> "Plainly, the rulings here have neither the second nor third of the required attributes. That is enough to disqualify them as appealable decisions. I say that because the first attribute - assuming it were present – cannot on its own confer appealability."

14] In my opinion what was stated in the *Guardian* case is also apposite to the

present matter. Because the issues between the parties are not *res judicata* it follows that whatever the outcome of this appeal, the appellant can start all over again. In my opinion it would have been more convenient and cost effective if the appellant had followed the route to re-apply for a sequestration order, after serving the documents, than to bring this matter on appeal as of right and running the risk that the matter was not appealable as such.

15] It was further stated in *Wellington Court Shareblock v Johannesburg City Council,* 1995 (3) SA 827 (AD) at 834A that in determining appealability of a decision the emphasis must be placed on the effect of the decision rather than on its form. This is relevant to the present case where at first blush it may seem that the order of the Court *a quo* has a definitive effect on the rights of the parties. That is however not so as the appellant can start anew after correcting the defect of non-service. (See also *Caroluskraal Farms (Edms) Bpk v Eerste Nasionale Bank van Suider Afrika Bpk,* 1994 (3) SA 407 (AD) at 414D).

16] I have therefore come to the conclusion that, also on the principles set out in the *Moch*-case, *supra,* that this matter does not comply with the statutory provisions to be appealable and that it must be struck off the roll.

17] There was also an application for condonation by the appellant for non-compliance with the provisions of Rule 5(5)(b) and 5(6)(b) of this Court but

because there was no proper appeal before us there is no need to deal with the application.

18] In the result the following order is made:

The appeal is struck off the roll with costs such costs to include the costs of one instructing counsel and one instructed counsel.

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STRYDOM, AJA

I agree

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SHIVUTE, CJ

I agree

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MTAMBANENGWE, AJA

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