

DISPUTES

Is the refusal of a provisional sequestration order appealable?

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On 14 April 2023, the Supreme Court of Appeal (“SCA”) delivered judgment in the matter of [Liberty Group Limited \(“Liberty”\) and Mohammed Shaaz Moosa \(“Moosa”\)](#)[1].

The aforesaid judgment concerned whether or not an order dismissing an application for provisional sequestration is appealable. Hitherto, previous judgments[2] had held that an appeal against an order refusing provisional sequestration was precluded by virtue of section 150(5), as read with section 150(1) of the Insolvency Act 1936 (“the Insolvency Act”).

The background to this judgment is as follows:

1. On 16 September 2016, Liberty obtained judgment against Moosa in the amount of R883,024.43 together with interest and costs. Liberty's claim against Moosa was based on a suretyship which Moosa had provided on behalf of Shaazura Investments CC;
2. Liberty attempted to execute its judgment against Moosa by declaring two immovable properties owned by Moosa executable in terms of Rule 46A of the Uniform Rules of Court. Moosa opposed the application and in the course of doing so, transferred ownership of the two immovable properties, on an expedited basis, to the Mubaraak Family Trust (“the Trust”), a discretionary trust. Moosa was the founder of the Trust and Moosa and his family members were its beneficiaries;
3. Liberty applied to sequester Moosa's estate. Moosa opposed the application for his sequestration on the basis that his liabilities exceeded his assets and that in the circumstances there would be no benefit to creditors in the event of his estate being sequestered;
4. Moosa, in his answering affidavit, opposing his sequestration proceedings, admitted being indebted to Liberty in the amount of R1,676,048.86 but described himself as both “factually” and “hopelessly insolvent”;
5. the KwaZulu-Natal Division of the High Court dismissed Liberty's application to sequester Moosa's estate and subsequently refused Liberty's application for leave to appeal;
6. Liberty therefore applied to the SCA for leave to appeal.

The SCA had to consider whether the refusal by the KwaZulu-Natal Division of the High Court to provisionally sequester Moosa's estate was appealable or whether such an appeal is precluded by section 150(5), as read with section 150(1) of the Insolvency Act.

Section 150(5) of the Insolvency Act provides that: “*There shall be no appeal against any Order in terms of this act except as provided in this Section*”.

In turn, section 150(1) of the Insolvency Act provides that: “*Any person aggrieved by a final order of sequestration or by an order setting aside an order of provisional sequestration may, subject to the provisions of Section 20(4) and (5) of the Supreme Court Act 1956, appeal against such order.*”

In considering the matter, the SCA considered, *inter alia*, the judgments in *Bhamjee* and *Lawclaims*, which held that an appeal against the refusal of a provisional sequestration order is precluded by virtue of sections 150(1) and (5) of the Insolvency Act.

The SCA, in considering section 150 of the Insolvency Act, noted that section 150 does not expressly provide for a right of appeal against a provisional sequestration order, but importantly also does not expressly exclude such a right.

The SCA held that there were “several additional considerations that detract from the tenability of the conclusion reached in *Bhamjee* and the cases that followed it”, those being that –

1. firstly, the decisions reached in the previous cases were inconsistent with the principle that the dismissal of an application, whether for final or interim relief is in general appealable;
2. secondly, the dismissal of an application for a provisional order to liquidate a company is appealable and that hence it is difficult to understand why its counterpart i.e. an application to sequester an individual's estate should equally not also be subject to appeal;
3. and thirdly, section 150(1) of the [Insolvency](#) Act provides that an order setting aside an order of provisional sequestration is appealable and that hence it is difficult to reconcile the express recognition of a right of appeal against an order setting aside an order of provisional sequestration but not the refusal of an order of provisional sequestration, given that both stand on the same footing.

Consequently, the SCA found that an order refusing provisional sequestration is appealable. The SCA granted leave to appeal against the decision of the court a quo and upheld the appeal. The SCA remarked that relying on *Bhamjee* and the decisions that followed it would result in a situation where the “final word has been spoken on the application” and that the “denial of a right of appeal may well mean that an obviously wrong judgment on the merits would not be open to correction. That would hardly be in the interests of justice and likely not be countenanced by the Constitution, leaving as it does, a litigant in the position of the present appellant [*Liberty*] remediless”.

Footnotes

[1] (126/2002) [2023] ZASCA 52 (14 April 2023)

[2] *Bhamjee Ltd v Van Harte* 1959 (4) SA (174) (**Bhamjee**); *Lawclaims (Pty) Ltd v Rea Shipping Co SA: Schiffskommerz Aussenhandelsbetrieb der VVB Schiffbau Intervening* 1979 (4) SA 745 (**Lawclaims**)



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