THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY: JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

FROM: The Registrar, Supreme Court of Appeal

DATE: 09 July 2020

STATUS: Immediate

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Moreau and Another v Murray and Others (251/2019) [2020] ZASCA 86 (9 July 2020)

Today, the Supreme Court of Appeal (the SCA) dismissed an appeal brought by the appellants, against a judgment of the Gauteng Division of the High Court, Pretoria.

The primary issue in the appeal was whether a pension benefit paid out to the insolvent, Mr Pierrie Moreau in June 2009, some two years before he was finally sequestrated on 1 August 2011, enjoyed the protection provided in s 37B of the Pensions Fund Act 24 of 1956 (the Act), which protects pension benefits against attachment by a trustee of an insolvent estate. After receiving the pension pay-out of R4 746 080.14, he paid R1 023 867 thereof to the first appellant, then his wife, and R3 500 00 thereof to the second appellant, Iprolog (Pty) Ltd (Iprolog). Iprolog purchased immovable properties with that money. In August 2009, the insolvent and the first appellant divorced each other. In the settlement agreement of the parties it was recorded that the insolvent owed the first appellant R3 722 213.14 in terms of the parties' antenuptial contract, and R1 023 867 for an alleged loan. According to the appellants, the payments of the pension money to the first appellant were in compliance with the terms of the divorce settlement agreement, which was made an order of court. After he was sequestrated, the respondents, the joint trustees of his insolvent estate, obtained an order in the Gauteng Division of the High Court, Pretoria, in terms of which the payments were set aside in terms of s 31 of the Insolvency Act 24 of 1936, and the appellants were interdicted from selling the property indirectly purchased with the pension money. The appellants appealed against those orders and submitted that the pension pay-out to the insolvent was exempt from attachment in terms s 37B, and that, in any event, the payments to the appellants could not be set aside as they were made in compliance with a court order. With regard to the Insolvency Act, it was submitted that neither of the provisions of the relevant sections had been established to justify setting aside the payments.

Section 37B provides that if the estate of any person entitled to a benefit payable in terms of the rules of a pension fund is sequestrated or surrendered, such benefit shall not be deemed to form part of the assets in the insolvent estate of that person and may not in any way be attached or appropriated by the trustee in his insolvent estate or by his creditors. In construing the section, the SCA considered, among others, the definitions of 'benefit' and 'member' in s 1 in the Act, and concluded that once the pension benefit is paid to a beneficiary, he or she ceases to be a 'member' of the pension fund according to the rules of the fund, and the money ceases to be a 'benefit'. It loses its character once in the hands of the beneficiary and becomes the beneficiary's ordinary money, which can be attached. Section 37A(1) could not be of any assistance either, for the same reasons.

Turning to whether the payments to the appellants ought to be set aside, the court considered s 31 of the Insolvency Act in terms of which the court may set aside any transaction entered into by the debtor before sequestration, whereby he, in collusion with another person, disposed of property belonging to him in a manner which had the effect of prejudicing his creditors or of preferring one of his creditors above another. The court rejected the appellants' submission that absent an application to impugn the decree of divorce, the payments made in terms thereof cannot be set aside, and that the payments to the first appellant could not be set aside based on the exclusionary clause in the definition of 'disposition' in s 2 of the Insolvency Act which provides that dispositions in compliance with a court shall not be set aside. The court pointed out that those provisions do not serve as an absolute bar, and that such payments could be set aside on the basis of either fraud, collusion or any other reprehensible conduct. In this case, there was sufficient basis to conclude that there was collusion between the insolvent and the first appellant, whose divorce was found to be a sham, and part of a scheme to ensure that the insolvent did not pay his debts. Also, the court found that the parties had used the corporate veil of the second appellant, for that purpose.

In the circumstances, the Court (per Makgoka JA) with Ponnan, Dambuza, Van der Merwe and Mbatha JJA concurring, dismissed the appeal with costs.