



CONSTITUTIONAL COURT OF SOUTH AFRICA

Stratford and Others v Investec Bank Limited and Others

CCT62/14

Date of hearing: 2 September 2014
Date of judgment: 19 December 2014

MEDIA SUMMARY

The following explanatory note is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.

Today the Constitutional Court handed down judgment in an appeal against the order of the Western Cape High Court, Cape Town (High Court), concerning the constitutional validity of certain notice provisions in the Insolvency Act 24 of 1936 (Insolvency Act) and their applicability to domestic employees in sequestration applications.

Mr and Ms Stratford are indebted to Investec Bank Limited (Investec) for over R240 million. After Investec was granted a provisional sequestration order in respect of the Stratfords' joint estate, it applied to the High Court for a final sequestration order. The Stratfords and their domestic employees (appellants) launched a counter-application, contending that section 9(4A) of the Insolvency Act is unconstitutional because it does not require notice of an employer's provisional sequestration application to be given to domestic employees.

The High Court granted a final order of sequestration, finding that there would be advantage to creditors if an appointed trustee investigated various transactions and assets upon sequestration of the joint estate. The Court rejected the appellants' constitutional challenge, following the Supreme Court of Appeal's decision in *Gungudoo and Another v Hannover Reinsurance Group Africa (Pty) Ltd and Another* [2012] ZASCA 83, which held that section 9(4A) only required notice to be provided to business employees and not domestic employees. The Court also dismissed the constitutional challenge because it found that notice had in fact been given to the domestic employees. The Supreme Court of Appeal subsequently dismissed the appellants' application for leave to appeal for lack of prospects of success.

In this Court the appellants submitted that excluding domestic employees from section 9(4A) is unconstitutional and breaches their rights to equality, dignity, fair labour practices and the right of access to the courts. They further contended that a final sequestration order should not have been granted because there was no advantage to creditors.

Investec detailed various possible recoverable assets and potentially impeachable transactions to illustrate that a final sequestration order would advantage creditors. It contended that notice was provided to the domestic employees, and thus the constitutional issue need not be decided. Alternatively, it contended that the section does not unfairly discriminate against domestic employees or impact their rights. The second respondent, the Minister of Justice and Constitutional Development, submitted that section 9(4A) was intended only to require notice to business employees and that this differentiation does not amount to discrimination, as domestic employees are adequately protected by other pieces of legislation.

In a unanimous judgment written by Leeuw AJ, the Constitutional Court dismissed the appeal, affirming the High Court's finding that a final sequestration order will advantage creditors and declining to interfere with the final sequestration order. This Court declared that the word "employees" in section 9(4A) of the Insolvency Act includes domestic employees, as this interpretation best promotes the spirit, purport and objects of the Bill of Rights. However, the Court limited the retrospective effect of this interpretation, given that many creditors would have acted on the authority of the *Gungudoo* decision. The Court found that furnishing the petition on employees is compulsory and that the petition must be made available in a manner reasonably likely to make it accessible to the employees. But, the Court held that there are conceivable instances where a provisional sequestration order may be granted despite failure to furnish notice, as the purpose of the provision is not to provide a technical defence to debtors. On the facts of this case, the Court held that the petition had been made available in a manner that was reasonably likely to become accessible to the Stratfords' domestic employees and accordingly, the High Court had been correct in granting the final sequestration order.