REPORTABLE

CASE NO.: SA 8/2006

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

J C L CIVILS NAMIBIA (PTY) LTD **APPELLANT**

and

WILMA STEENKAMP **RESPONDENT**

CORAM: Shivute, C.J., Maritz, J.A. *et* Strydom, A.J.A.

HEARD ON: 11/10/2006

DELIVERED ON: 08/12/2006

APPEAL JUDGMENT

STRYDOM, A.J.A.: [1] The respondent in this matter did carpentry and joinery work as subcontractor for the appellant. Respondent alleged that on completion of the work the appellant owed her an amount of N$ 225 869,55. When no payment was forthcoming the respondent issued summons and obtained judgment by default in the above amount. Notwithstanding judgment the respondent did

not receive any payment as a result of which a writ of execution was issued which led to the attachment of a payment certificate in favour of the appellant in an amount of approximately N$1 Million.

[2] This at last elicited reaction from the appellant which in turn led to an agreement between the parties whereby respondent would release the payment certificate from attachment on condition that the appellant paid the amount of N$225 869,55 into the trust account of his attorneys, Messrs. P.F Koep & Co. It now also became clear that the appellant disputed part of the respondent's claim. An amount of N$95 309,01, not in dispute, was paid to the respondent. The balance was to remain in the trust account until the dispute between the parties had been resolved. It was further agreed that the respondent would not oppose an application by the appellant for a rescission of the default judgment.

[3] The respondent further alleged that the money paid into the trust account of appellant's attorney was in effect security for the balance of her claim.

[4] Then on 22nd November 2004 an application was launched by the appellant whereby an offer of compromise was made to the creditors of the appellant in terms of the Companies Act. This order was granted by the Court on the same day and in terms thereof Mr. Claus Jurgen Hinrichsen was authorised to convene the meetings with creditors of appellant and to act as Chairman of such meetings.

[5] The meetings were held and a statement in terms of section 312(1) and (2/ of the Companies Act, Act 61 of 1973, was duly filed by the Chairman.

[6] It is alleged that notwithstanding the fact that the respondent was a judgment creditor of the appellant no notice of any meeting of creditors was given to her. However it seems that the legal practitioner, as well as the respondent, attended a meeting and there is a dispute whether, on this occasion, Mr. Vaatz, the legal practitioner of the respondent, admitted to the Chairman that the respondent was not a secured creditor but an ordinary concurrent creditor of the appellant.

[7] During this time the respondent became aware that the legal practitioner of the appellant had sent the money, held in its trust account as security for the respondent's claim, to the Chairman, Mr. Hinrichsen, because of the intervening offer of compromise by the appellant.

[8] Because the respondent was also nowhere reflected as a creditor of the appellant and because appellant was not taking any further steps to prosecute its application for rescission of the default judgment, the respondent launched an application to the High Court and obtained the following order:

> "1. That the Court directs the attorneys for the defendant, Messrs P.F. Koep & Co, to retain the money (N$ l30 144,64) paid into their trust account by the Defendant, being the full amount of the judgment

claim until the matter has been disposed of by way of an agreement or in terms of a court order.

2. That the Court makes a declaratory order that the Plaintiff is a secured creditor against the Defendant in view of the payment the Defendant had made into the trust account of Defendant's attorney by way of security at the time.

3. That the defendant state in writing within fourteen (14) days of the date of this Court order whether or not the Defendant intends to proceed with its application for rescission of judgment.

4. That the Defendant furnishes the Plaintiff with a copy of the offer of compromise and with the necessary documents to proof (*sic*) a claim to the Receiver allegedly appointed in terms of the offer of compromise.

5. That the Plaintiff is hereby advised to within ten (10) days from date of this Court order who has been appointed in Namibia as Receiver in terms of the offer of compromise." (*sic*)

[9] Although the application was served on the attorneys of the appellant there was no defence to the application and the order was granted by default.

[10] This again elicited reaction from the appellant which filed a notice of appeal in terms of which it appealed on various grounds against the order granted by default.

[11] Mr. Tötemeyer argued the appeal on behalf of the appellant and Mr. Vaatz argued on behalf of the respondent.

[12] The record of appeal was filed out of time which necessitated an application for condonation. This application was not opposed by the respondent. According to the explanation given some problems were encountered in regard to the completion of the record of appeal and it was stated that the record was filed as soon as it became available.

[13] The explanation was accepted by the Court and condonation was granted.

[14] Two further issues need to be addressed at this stage. The first is whether, in the circumstances where the appellant did not oppose any of the relief claimed, it could now appeal the order of the Court *a quo*, and whether in any event the order was appealable. Secondly, an application was launched by the appellant in which it asked this Court to allow it to amplify the record of appeal by accepting three further documents as part of such record as well as an affidavit of Mr. Hinrichsen.

[15] In regard to the first issue the Registrar of the Court addressed the following letter to the respective parties, namely:

> "His Lordship, the Chief Justice, directed that counsel should be invited to file heads of argument before – and to present argument at – the hearing of the appeal on the following issues:
>
> "1. Could (and if so, should) the Supreme Court entertain the appeal in circumstances where –
>
> (a) the appellant did not file a notice of intention to oppose in the application;
>
> (b) the appellant did not file any answering affidavit or give notice of its intention to raise a question of law;
>
> (c) the appellant did not oppose the granting of the relief prayed for in the application before the court *a quo*;
>
> (d) the appellant did not move any application to rescind the order granted?
>
> 2. Was the application in the Court *a quo* interlocutory in nature and, if so, was leave to appeal required?"

[16] Both Counsel filed Heads of Argument and the Court is indebted to them for doing so at short notice.

[17] With reference to the provisions of sec. 18(1) of the High Court Act, Act l6 of 1990, Mr Tötemeyer submitted that the default judgment granted in the matter was final in effect and that sec. 18(1) therefore granted a direct right of appeal to this Court. Counsel referred the Court to the matter of *Sparks v David Polliack & Co. (Pty*) Ltd, 1963 (2) 491(T).

[18] Mr. Vaatz agreed that the matter was appealable but he submitted that it was interlocutory in nature and that it was therefore necessary to obtain leave to appeal before this Court could hear the matter. Mr. Vaatz referred the Court to the case of *Von der Nist v Pickering,* 1931 NLR 185 and to *S.A. Civil Procedure in the Superior Courts,* 4th Ed., by the authors Herbstein and van Winzen, p877 - 883.

[19] I agree with Counsel that sec. 18(1) of Act 16 of 1990 affords a general right of appeal in these proceedings to the Supreme Court. This section provides as follows:

> "l8(1) An appeal from a judgment or an order of the High Court in any civil proceedings or against a judgment or order of the High Court on appeal shall, in so far as this section otherwise provides, be heard by the Supreme Court."

[20] A limitation on this general right of appeal is found in sec. 18(3) which provides that where the judgment or order under appeal is interlocutory, or only against an order of costs which is left by law to the discretion of the court, then leave to appeal is required.

[21] It was submitted by Mr. Tötemeyer that because the appeal was only launched after the period, within which rescission of judgment could be applied for in terms of the Rules of Court, had lapsed, the judgment or order was final.

[22] Whether the appellant was limited to its remedy in terms of the Rules of Court and was forced to apply for a rescission of judgment or whether it could appeal, is fully dealt with in the cases quoted by Counsel. In the case of *Sparks v David Polliack & Co, supra,* the Court (Trollip, J, as he then was) dealt with a judgment by default granted by a magistrate's court in terms of sec. 83(b) of the

Magistrate's Court Act, which required that a judgment should be final before it is appealable. At p. 494G – 495A the learned Judge stated the following:

> "The test of appealability in such cases is whether the judgment was final or provisional, and not whether another remedy was available in the Court *a quo* which should have been first exhausted. The fact that the remedy of rescission is available in the court that granted the judgment, is of course an important factor in determining whether the judgment is final or merely provisional, but it is not decisive as *Austin v Mills, supra,* indicates. A judgment might, in terms of the statute and practice of court, be final and therefore appealable even though the remedy of rescission is also available; and if the statute does confer the right to appeal against the judgment, I do not think that the Appeal Court is entitled to frustrate that right by refusing to entertain it merely because the remedy of rescission is also available to the defendant in the court *a quo. (Goldberg v Goldberg, 1938 WLD 83 at 85).* After all the appellant is *dominus litis* and it is for him to select the remedies available to him what particular remedy he wishes to invoke and if he chooses his statutory right to appeal, I do not think that the Appeal Court could refuse to hear it."

[23] In the present instance the time for rescission of the judgment had lapsed and notice of appeal was given after the lapse of such period. The person who could apply for the rescission is before this Court on appeal. It seems to me that this is an instance where the Court can also accept that the appellant waived its right to apply for a rescission and elected instead to come on appeal. See *Sparks-case, supra*, p496E-F.

[24] Mr. Vaatz, on the other hand, based his argument that this is an interlocutory application on the fact that the rescission of the main application for payment of the debt is still not resolved. This appeal does not concern that judgment. It concerns the subsequent order made by the Court *a quo* and in regard to which the time for rescission has lapsed.

[25] In the circumstances I agree that the order is appealable and that no leave

to appeal is necessary in view of the Court's finding that it is a final order.

[26] The second issue which must be addressed is the application to put further evidence before this Court which was not before the Court *a quo*. This new evidence consists of three documents as well as an affidavit by Mr. Hinrichsen. If the Court should allow the affidavit by Mr. Hinrichsen then it follows that the replying affidavit by the respondent should also be allowed.

[27] Although, by sec. 19(a) of Act 15 of l990, this Court is granted wide powers to receive evidence on appeal a reading of the cases has shown that this is a power which the Court would exercise sparingly and only where certain prerequisites are complied with. These are firstly that a reasonable and acceptable explanation must be given why the evidence was not tendered at the trial. Secondly the evidence must be essential for the case on hand and thirdly it must be of such a nature that it may probably have the effect of influencing the result of the case. (See *Staatspresident en 'n Ander v Lefuo,* 1990 (2) SA 679 (AD) at 691C – 692C)

[28] In the present case there is obviously not an acceptable explanation why the evidence was not put before the Court *a quo* in the first place because the matter was left undefended. The only reasons given by the deponent to the affidavit were that for reasons unknown certain documents were not put before the Court. Further an attempt was made to make out a case by referring to the importance of the documents.

[29] The rules referred to above have crystalized over many years. In one of the first cases concerning these principles, namely *Shein v Excess Insurance Co Ltd.* 1912 AD 418, Innes, ACJ, explaining that special grounds must exist before a Court would grant such an application, expressed himself as follows at p. 429-

> "It would be undesirable to endeavour to frame an exhaustive definition of the special grounds on which the Court ought to accede to the application of a litigant desirous of leading further evidence upon appeal. But neither the circumstance that the matter at issue is of great importance to the applicant nor the circumstance that he finds himself able materially to strengthen the case he made in the trial Court or materially to weaken that of his opponent would in themselves be such special grounds.

[30] The appellant, by electing to let the matter go by default and failing to

present the facts now tendered as part of an application for rescission of judgment has deliberately made his choice and cannot now complain if he finds himself in a position where his case could have been strengthened, or that of the respondent weakened by evidence which was available but was not put before the Court.

[31] For the above reasons the appellant's application to introduce new evidence on appeal is dismissed with costs. For purposes of taxing these costs the Registrar is directed to allow half an hour for argument on this point.

[32] The debt between the parties arose as a result of a contract between the appellant and the respondent whereby the respondent did carpentry and joinery work in houses built by the appellant. The contract was personal with no indication that payment was secured in any way.

[33] When the work was completed and payment still outstanding judgment was obtained by the respondent for the full amount outstanding. A writ of execution was issued and an attachment was made. Concerning the allegation by the respondent that she holds a secured claim which would then give her preference over other claims against the estate of the appellant and would also have secured the respondent's claim against the supervening offer of compromise made by the Court, it is necessary to see whether, during any of the stages through which the debt went, it was converted into a secured right as alleged.

[34] As a result of the offer of compromise by the appellant the High Court ordered:

> "10. That all legal proceedings pertaining to the liquidation of and execution against the Applicant, be forthwith suspended from date of this order to the date of sanctioning of the envisaged compromise, alternatively the withdrawal of this application."

[35] At the time when the offer of compromise was made and when the above

order was issued the respondent had already come to an agreement with the appellant to release the certificate of payment attached by her in lieu of payment of the judgment amount into the trust account of the appellant's attorney. It was this step taken by the appellant which prompted the respondent to attempt to secure her position as a creditor by applying to the Court *a quo* to declare her as a secured creditor in regard to the debt owed to her by the appellant.

[36] Provided that the appellant kept to this bargain, which was made with the respondent, the debt would have been 'secured' but for the supervening offer of compromise as a result of which a *concursus creditorum* was created and, if sanctioned by the Court, would have divided the creditors of the appellant into preferent and/or secured creditors and concurrent creditors. As a result of the order of the Court *a quo* the respondent finds herself in the advantageous position that she can claim payment of her claim 'out of' the money so deposited in the trust account of appellant's attorney instead of ranking as a concurrent creditor who would only receive a dividend.

[37] The question is whether the appellant is a secured creditor and whether the Court *a quo* was correct to make such a declarator.

[38] The ranking of creditors in a compromise would ordinarily be divided between secured and preferent creditors on the one hand and concurrent creditors on the other hand. The principles applied in cases of liquidation or insolvency would therefore be relevant.

[39] In terms of sec. 98(2) of the Insolvency Act, Act 24 of 1936, the attachment of any property in execution of any judgment shall not confer on the judgment creditor any preference except his taxed costs in those proceedings not exceeding

R50. Meskin, *Insolvency Law,* states that the statutory provisions have the effect of also destroying the common law preference previously acquired by a judgment creditor upon attachment of property in execution.
(See *Simpson v Klein NO and Others,* 1987 (1) SA 405(W) at 412B

[40] In the *Simpson*-case, *supra*, Kriegler, J, had to determine whether immovable property which was attached in terms of several writs of execution was part of the estate of the insolvent seller, where the writ was supervened by the insolvency, and although the property was sold, it was not yet transferred. The Court concluded that in terms of sec 20 of the Insolvency Act the property still vested in the trustee.

[41] Although a judgment creditor who has made an attachment thereby established a *pignus judiciale* the effect of a supervening sequestration, for as long as the sale in execution has not been perfected, divests such creditor of the preference in terms of the common law. (*Simpson's* – case, *supra*, p.411G – 412A*).*

[42] In the present instance it seems to me that the appellant lost the possible preference she had in terms of the *pignus judiciale* by the subsequent agreement whereby the attached payment of the money certificate was released in favour of payment into the trust account of the legal practitioners of the appellant.

[43] What must now be determined are the rights of persons who became creditors of money paid into the trust account of a legal practitioner and whether the respondent became such a creditor. Obviously if nothing goes wrong creditors are entitled to full payment of money held on their behalf in such trust account. Should a sequestration of the legal practitioner supervene, their rights must be determined in accordance with the Legal Practitioner's Act, Act 15 of 1995 ("the Act").

[44] Section 26(1) provides that every legal practitioner who holds or receives money on behalf of or for any other person shall open a separate trust banking account where such moneys are to be deposited. In terms of sec. 27 money standing to the credit of a legal practitioner's trust account shall not be regarded as part of the legal practitioner's assets except in so far as there might be a free residue in such account after payment of all claims in regard to the trust account as well as interest received on moneys invested. The trust account can also not be attached for or on behalf of a creditor of that legal practitioner.

[45] A similar provision to that contained in the Act was part of the previous Attorneys Admission Act, Act 23 of 1934, (R.S.A.) sec 33(7). In regard to this section Hefer, J, (as he then was), stated the following in the matter of *Fuhri v*

Geyser NO and Another, 1979 (1) SA 747 at p 749C – E:

> But, despite the separation of trust moneys from an attorney's assets thus affected by s 33(7), it is clear that trust creditors have no control over the trust account: ownership in the money in the account vest in the bank or other institution in which it has been deposited (*S v Kotze, 1965 (1) SA 118 (A)* at *124),* and it is the attorney who is entitled to operate on the account and to make withdrawals from it (*De Villiers NO v Kaplan, 1960 (4) SA 476 (C)).* The only right that trust creditors have, is the right to payment by the attorney of whatever is due to them, and it is to that extent that they are the attorney's creditors. This right to payment plainly arises from the relationship between the parties and has nothing whatsoever to do with the way in which the attorney handles the money in his trust account.

[46] Thus the relationship is one of debtor and creditor with exclusion of any and all other creditors of the attorney except in so far as there might be a free residue in the trust account after payment of all trust creditors. In regard to the trust account it can be said that the position of trust creditors is analogous to a preferent claim. (See *Geyser NO v Fuhri, 1980 (1) SA 598 (NPD),* a Full Bench decision confirming the judgment of Hefer ,J, in the former quoted case. See also *Ex Parte Law Society, Transvaal : In re Hoppe and Visser,* 1987 (2) SA 773 (TPD)).

[47] In the present instance the money kept in the trust account of the appellant's legal practitioner was so kept in terms of an agreement between the parties. In my opinion this agreement did not give rise to a secured and/or preferent claim. Meskin, *Op. cit., par 9.1.2.1* states that a secured claim "is one in respect of which the creditor holds security, i.e. has a preferent right over property of the insolvent". Examples given by the learned author are the landlord's hypothec, a pledge, a right of retention or a special mortgage or a notarial mortgage bond in terms of sec. 1 of Act 57 of 1993 or a session *in securitatem debiti*.

[48] With reference to the Insolvency Act the learned author states:

> "In this context, a preferent right to payment, i.e. a preference, means a right to payment 'out of' property of the estate in preference to other claims. In the case of a secured claim, the creditor has a right to payment 'out of' the particular property by which his claim is secured which ranks before the right to payment of any other creditor of the estate. In this context, by payment 'out of' the property is meant payment from the proceeds of the realisation thereof by the trustee in the course of his administration subject to the provisions of the Insolvency Act regulating the realisation of securities for claims and providing for costs of sequestration".

[49] From the citation above it is apparent that there is not a limited number of real rights and that by means of statutory enactments, as an example, real rights may be created. Therefore, rather than to determine the right of the respondent by reference to the enumerated categories, one should look at the nature of the respondent's right to see whether she is a secured creditor.

[50] The original debt arose from a personal agreement between the appellant and the respondent. The judgment and the writ of attachment, which established a *pignus judiciale*, was abandoned in favour of the agreement whereby the judgment debt was paid into the trust account of the appellant's legal practitioner to be held until the dispute between the parties was solved. To that extent the respondent agreed to a rescission of the judgment.

[51] Whilst the money was so held it was supervened by first the offer of compromise and secondly the sanction of that offer by the Court. At the time of the sanction of the compromise respondent's claim to the money paid into the trust account depended on whether the appellant owed her money and if so, what the amount thereof was. In terms of the cases set out above the respondent, at this stage, was not a trust creditor. The money paid into the trust account was not held for and on behalf of the respondent but was paid to get the release of the payment certificate. Until the dispute was resolved respondent did not have a right of preference to get paid 'out of' the money paid into the trust account.

[52] Once the attachment was abandoned the judgment, by itself, did not create

a preference because the judgment gave no right to the respondent to payment "out of" any property which secured the respondent's claim and once the compromise supervened the money held in trust became part of the estate of the appellant.

[53] An offer of compromise only binds creditors once it has been sanctioned by the Court and registered in terms of the Companies Act. Although there is no order of Court attached to the documents showing that the offer in this instance was sanctioned by the Court certain correspondence attached by the respondent in my opinion clearly showed that that was the case.

[54] There was firstly the letter by Mr. Hinrichsen to P.F. Koep & Co. dated 9th November 2005. In this letter the author referred to the fact that he rendered his report to the Court whereupon the Court granted an order sanctioning the compromise and the order was also registered with the Registrar of Companies. Mr. Vaatz also attached a letter by attorneys Gys Louw which showed that a draft first and final distribution account was drawn up in regard to the creditors of the appellant. This could only have happened once there was a sanction by the Court of the offer of compromise.

[55] These documents, which were placed before the Court by the respondent, in my opinion sufficiently proved that the offer of compromise was sanctioned and registered.

[56] For the reasons stated and the conclusion arrived at the claim of the respondent is not a secured creditor, the first two paragraphs (paragraphs 1 and 2) of the order of the Court *a quo* cannot be allowed to stand and must be set aside.

[57] There is no basis on which this Court can interfere with paragraphs 3, 4, and 5 of the order and those orders must remain.

[58] The appellant was substantially successful and should be awarded the costs of appeal.

[59] In the result the following order is made:

1. The application to introduce new evidence is dismissed with costs and the Registrar is directed to allow no more than half an hour for argument when taxing those costs.
2. The appeal succeeds to the extent that paragraphs 1 and 2 of the order dated 30 January 2006, are set aside.
3. The respondent is ordered to pay the costs of appeal including the costs of one instructing and one instructed counsel.

(signed) G.J.C. Strydom

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STRYDOM, A.J.A.

I agree.

(signed) P.S. Shivute

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SHIVUTE, C.J.

I agree.

(signed) J.D.G. Maritz

_____

MARITZ, J.A.

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