

SOUTH AFRICA / JUDGMENT

Dupont NO and Others and Lehlobo's Trading and Enterprise (Pty) Ltd ta Lehlobo Auto Body Repairs and Others - Leave to Appeal (123253/2023) [2024] ZAGPJHC 608 (1 July 2024)

[2024] ZAGPJHC 608

COURT

South Gauteng High Court, Johannesburg

BEFORE

Marcus

CASE / FILE NUMBER

123253/2023

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

Source record

REPUBLIC OF SOUTH
AFRICA

IN THE HIGH COURT
OF SOUTH AFRICA
GAUTENG DIVISION,
JOHANNESBURG

(1)

NOT REPORTABLE

(2)

NOT OF

INTEREST TO OTHER JUDGES
CASE

NO: 123253/2023

In the matter between:

STEPHEN
ROBERT DUPONT N.O.
First Applicant
DONYA
DUPONT
N.O. Second
Applicant
KOSTA
GEORGIEV N.O.
Third Applicant
And
LEHLOBO'S
TRADING AND ENTERPRISE (PTY) LTD t/a
LEHLOBO
AUTO BODY REPAIRS (IN BUSINESS RESCUE) First
Respondent
HERBERT
BONGANI MATHIBELA N.O. Second
Respondent
COMPANIES AND
INTELLECTUAL PROPERTY
COMMISSION
Third Respondent
This judgment was handed
down electronically by circulation to the parties legal
representatives by email, and uploading on Caselines.
The date and
time for hand-down is deemed to be 10h00 1 July 2024
JUDGMENT ON LEAVE TO
APPEAL
[1]
On 12 June 2024 I delivered an ex
tempore judgment in which I granted the

following orders:

"1.
The applicants are granted leave to amend their notice of motion.
2.
The applicants non-compliance with
the Uniform Rules of Court relating to forms, service and time
periods is condoned and the matter
is heard on an urgent basis in
terms of Rule 6(12)(a).
3.
The applicants are granted leave, to
the extent necessary, in terms of s 133(1)(b) of the Companies Act 71
of 2008 ("Companies Act") to bring this application and
to request the relief sought in paragraphs 2 to 9.
4.
Setting aside in terms of s
130(1)(a)(ii) and (iii) and 130(5)(ii) of the Companies Act
a.

the resolution of the respondent
dated 19 June 2023 placing the first respondent under business rescue
as provided for in s 129 of the Companies Act; and

b.

the appointment of the second
respondent as business rescue practitioner.

5.

Placing the first respondent under
provisional winding-up.

6.

All persons who have a legitimate
interest are called upon to put forward their reasons why this court
should not order the final
winding-up of the respondent on 16 July
2024 at 10h00 or as soon thereafter as the matter may be heard.

7.

A copy of this order must be served
on the first respondent at its registered office. A copy of this
order must be published forthwith
in the Government Gazette.

8.

A copy of this order must forthwith
be forwarded to each known creditor by prepaid registered post or by
email.

9.

A copy of the provisional winding-up
order must be served on –

a.

every registered trade union
representing the first respondent's employees, if any

b.

the employees of the first
respondent by affixing a copy of the application to any notice board
to which the employees have access
inside the first respondent's
premises or if there is no access to the premises by the employees,
by annexing a copy to the
front gate, where applicable, failing which
to the front door of the premises from which the first respondent
conducted any business
at the time of the presentation of this
application, and

c.

The South African Revenue Service.

10.

Any person who is entitled to respond to
this rule nisi is also entitled to apply on notice to the applicants
to anticipate the
return date and to set the matter down for
determination on an earlier date as one of urgency, if circumstances
justify it.

11.

The costs of this application are to be costs in the winding-up.”

[2]

The respondents in this application, to which I will refer as the “main application” filed an application for leave to appeal to a Full Bench on Thursday 20 June 2024. I shall continue to refer to the parties as they were in the main application.

[3]

Because my term as an Acting Judge of this Division was due to end on 21 June 2024, I set the application for leave to appeal down for a hearing on that day. However, I received an email from the respondents’ attorneys advising that Mr Mantsha, who appeared for the respondent in the main application, was unable to be present at court due to family funerals. In the circumstances, I directed the parties to file heads of argument in relation to the application for leave to appeal and indicated that I would deal with the matter on the papers, as I am entitled to do. (See *Mogale and others v Seima* 2008 (5) SA 637 (SCA) at para 2).

[4]

Applications for leave to appeal are determined by section 17 of the Superior Courts Act 10 of 2013. Leave to appeal may only be given, inter alia, where “the appeal would have a reasonable prospect of success”. After some debate as to whether this provision postulated a higher bar than was previously the case, the Supreme Court of Appeal has

settled that issue, stating:

“I am mindful of the decisions at high court level debating whether the use of the word ‘would’ as opposed to ‘could’ possibly means that the threshold for granting the appeal has been raised. If a reasonable prospect of success is established, leave to appeal should be granted. ... The test of reasonable prospects of success postulates a dispassionate decision based on the facts and the law that a court of appeal could reasonably arrive at a conclusion different to that of the trial court.”

Ramakatsa

v African National Congress [2021]
ZASCA 31 (31 March 2021) at para 10

[5]

The application for leave to appeal raises eight grounds of appeal including appeals against the two purely procedural matters dealt with in my judgment, namely, the admission of a supplementary affidavit, to which the respondents filed an answer, and allowing the amendment to the notice of motion, which was occasioned by the changed circumstances set out in the supplementary affidavit.

These grounds of appeal, even if they raise appealable issues, which is doubtful, are devoid of merit. In the hearing on the merits and in light of the fact that the respondents had filed an answer to the supplementary affidavit, I asked counsel for the respondents to identify what prejudice the respondents had suffered. He was unable to point to any prejudice and none is identified in his heads of argument on leave to appeal. I accordingly ordered the admission of the supplementary affidavit and allowed the amendment to the notice of motion by exercising a discretion to do so. That disposes of the sixth and seventh grounds of appeal.

[6]

The remaining grounds of appeal go to the substance of the order granted. (I focus on those grounds of appeal addressed in the heads of argument). In my ex tempore judgment, I was at pains to point out that the resolution of factual disputes in motion proceedings is governed by well settled rules. I gave particular attention to the question of whether the business rescue plan had been adopted. On the papers there was no evidence that the plan had been adopted and Mr Mantsha informed me from the bar that it had not been adopted. Accordingly, the contention that I erred in not considering the business rescue plan (the second ground of appeal) is without merit. In his heads of argument on leave to appeal, counsel contended that regard should have been to the business rescue plan which, according to counsel “had all the details and facts to show that the ‘company’ can be reasonably .. rescued”. There are two problems with this contention First, the business rescue plan had not been adopted. Accordingly, it has no status beyond a recommendation. Second, the business rescue plan was prepared on 15 November 2023. Accordingly, the business rescue plan does

not take account of the changed circumstances necessitating the urgent approach to the court, some seven months later.

[7]

As to the remaining grounds of appeal, they all essentially turn on whether the company has any reasonable prospects of being rescued.

That is a factual enquiry. I referred in my ex

tempore judgment to PFC Properties (Pty)

Ltd v Commissioner of the South African Revenue Service and others 2024 (1) SA 400 (SCA) where the point was made at paragraph 27 that:

“Business

rescue proceedings are aimed at restoring a company to solvency and are not to be abused by a company with no prospect of being rescued, but mainly to avoid a winding-up or to obtain some respite for creditors.”

[8]

At the level of fact, I reached the conclusion that on the facts of the present case, business rescue was incapable of meeting the stated objective. This issue fell to be determined by the established rules for resolving factual disputes in motion proceedings.

On this score, the respondents have simply not come to grips with the facts put up by the applicants which demonstrated that the company was beyond rescue.

[9]

In the first ground of appeal, it is contended that I “erred in concluding that there was no reasonable basis for believing that [the Company] was financially distressed” at the time of the resolution to place it under business rescue. I made no such finding. It was common cause that the company was financially distressed. The core issue before me was whether there remained any reasonable prospect of it being rescued. Indeed, the orders I granted flow from my acceptance, on the facts, that the company was financially distressed, but with no reasonable prospect of recovery.

[10]

In the fourth ground of appeal, it is contended that I erred in “concluding that it was just and equitable to set aside the resolution to place [the Company] under business rescue proceedings without having regard to all the evidence”. Again, this is not correct. The setting aside of the

resolution flowed from the conclusion I reached on the facts that there was no reasonable prospect that the company could be rescued. In this regard, the heads of argument do not come to grips with the changed circumstances that emerged after the business rescue plan was tabled (regardless of the fact that it was not adopted). In my judgment, I referred to the undisputed evidence in this regard. Logically, the enquiry cannot be confined to the date when the resolution was adopted. The relevant time is when the resolution is challenged in a court of law in the light of changed circumstance (Cf Nedbank Ltd v Pacinamix (Pty) Ltd and other 2023 JDR 4563 (GJ) at para 21). Accordingly, the orders granted are accommodated by my just and equitable discretion.

[11]

The third ground of appeal was that I erred “by concluding that the First Respondent failed to satisfy the procedure requirement set out in section 123 of the Companies Act and by so doing disregarding the administrative process as outlined by the first Respondent, in the business rescue plan.” No argument was addressed on this ground of appeal. Indeed I did not make the finding alleged.

[12]

The fifth ground of appeal is that I “erred by setting aside the appointment of the second Respondent with due regard to the requirements of section 138 of the Companies Act”;. No argument was addressed to this ground of appeal. Once I had concluded that the Company was beyond rescue, the setting aside of the appointment of the business rescue practitioner was a logical consequence.

[13]

The eighth ground of appeal is that I “erred by granting the order in terms of section 133(1)(b) of the Companies Act while the jurisdictional requirements of granting such was absent”. No argument was addressed to this ground of appeal. Accordingly no attempt was made to identify which jurisdictional facts were allegedly absent. As already indicated, the facts demonstrated that there was no reasonable prospect of the company being rescued

[14]

In the circumstances I make the following

order: The application for leave
to appeal is dismissed with costs.
MARCUS AJ
Gauteng Division,
Johannesburg

JUDGMENT

DATE: 1 July 2024 FOR THE APPLICANTS: Adv M Gwala (Respondents in leave to appeal) FOR
THE RESPONDENTS: Mr L Mantsha (Applicants in leave to appeal)

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZAGPJHC/2024/608.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/dupont-no-v-and-others-unknown-topic-agpjhc-2024>

Prepared on 11 October 2026 · Esheria