

SOUTH AFRICA / JUDGMENT

Klopper N.O and Another v Gupta (84095/2018) [2020] ZAGPPHC 14 (7 February 2020) [2020] ZAGPPHC 14

COURT

North Gauteng High Court, Pretoria

BEFORE

A.P. Ledwaba, N. Janse Van Nieuwenhuizen, M.L.
Senyatsi

CASE / FILE NUMBER

84095/2018

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IN THE HIGH COURT OF SOUTH
AFRICA
(GAUTENG DIVISION, PRETORIA)
REPUBLIC OF SOUTH AFRICA
(1)

REPORTABLE: YES/NO
(2)
OF
INTEREST TO OTHER JUDGES: YES/NO
(3)
REVISED
Case
Number: 84095/2018
7/2/2020
In

the matter between: JOHAN
 LOUIS KLOPPER
 N.O.
 First Applicant
 KURT
 ROBERT
 KNOOP
 Second Applicant
 And
 CHETALI
 GUPTA
 Respondent
 In

re: CHETALI
 GUPTA
 Applicant
 JOHAN
 LOUIS KLOPPER N.O.
 First Respondent
 KURT
 ROBERT KNOOP
 Second Respondent
 JOHAN
 LOUIS KLOPPER
 Third Respondent
 THE
 COMPANIES AND INTELLECTUAL
 PROPERTY
 COMMISSION
 Fourth
 Respondent

JUDGMENT

THE COURT

[1] This is an application for leave to appeal the order and judgment handed down by this court on 13 December 2019. The first and second

applicants bring the application in their capacity as the business rescue practitioners of Islandsite Investments One Hundred and Eighty (Pty) Ltd ("Islandsite") and Confident Concept (Pty) Ltd ("Confident Concept").

[2] For ease of references the parties are referred to as cited in the judgment and the first and second applicants will collectively be referred to as "the respondents".

GROUND OF APPEAL

[3] The instances in which the respondents allege that the court erred, can succinctly be summarised as follows:

[3.1] in finding that the applicant's affidavit should be accepted and admitted into evidence;

[3.2] in finding that the respondents had failed to discharge their duties in good faith, objectively and impartially; that it was untenable to contend that they had overseen the sale of the assets of the companies; that they had unabatedly continued to sell off the assets and earn fees without a plan as to how the businesses would operate after creditors had been paid; and that they had failed to deal with how they would secure a bank account for the companies in order for them to continue;

[3.3] in finding that the respondents' lack of good faith was demonstrated by their failure to substantiate their allegations of gross and reckless mismanagement and to report the criminal unlawfulness of the prior board and shareholders to the authorities; that such failure tainted their investigations into the affairs of the companies and their impartiality; and that it was a grossly disingenuous litigation tactic to raise such allegations in the application;

[3.4] in finding that the respondents had vilified the board and shareholders, on the one hand, yet on the other, wanted to rescue the companies for the benefit of the board and shareholders, and that this cast doubt on their good faith and credibility;

[3.5] in failing to consider the judgment of Potterill J in *Oakbay Investments (Pty) Ltd v Tegeta Exploration and Resources (Pty) Ltd* (HCGDP, case number 83344/18) delivered on 30 August 2019, in which the court found that the mere fact that the respondents are business rescue practitioners of different companies within the Oakbay Group did not amount to a lack of independence or constitute a reason for their removal;

[3.6] in finding that the business rescue proceedings shall be deemed to have lapsed in the event that the companies fail to appoint business rescue practitioners within ten days, such order being competent as the Companies Act, 2008 does not make provision for such an order and the order effects the rights of inter alia creditors who are bound by the approved plan but were not before court.

[4] The respondents further contended that:

[4.1] the case is of considerable public interest and importance and raises novel and complex issues;

[4.2] the findings in respect of conflict was dealt differently by another court in the same division.

LEGISLATIVE FRAMEWORK

[5] Section 17 of the Superior Courts Act, 10 of 2013 deals with the requirements that an application for leave to appeal have to comply with. Section 17(1)(a) is applicable to the application in casu and reads as follows:

"17(1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that-

- (a) (i) the appeal would have a reasonable prospect of success; or
- (ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;"

DISCUSSION

[6] We are of the view that compelling reasons exist for the appeal to be heard, to wit;

[6.1] the case is of considerable public interest;

[6.2] the lacuna in Companies Act, 71 of 2008 and more specifically section 139(3) in respect of the time period within which a new business rescue practitioner should be appointed;

[6.3] the status of the business rescue proceedings if a new business rescue practitioner is not appointed;

[6.4] the conflicting decision in this division in Oakbay Investments (Pty) Ltd v Tegeta Exploration and Resources (Pty) Ltd (HCGDP, case number 83344/18) delivered on 30 August 2019, in respect of the question of a conflict of interest in respect of the same business rescue practitioners in similar circumstances.

ORDER

[7] In the premises, the following order is granted:

1. Leave to appeal to the Supreme Court of Appeal against the judgment and order of this court delivered on 13 December 2019 is granted;
2. Costs of the application to be costs in the appeal.

A.P. LEDWABA

DEPUTY JUDGE PRESIDENT OF THE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

N. JANSE VAN NIEUWENHUIZEN

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

M.L. SENYATSI

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

DATE HEARD

30 January 2020

JUDGMENT

DELIVERED

7 February 2020

APPEARANCES

Counsel for the First and

Second Applicants:

Advocate P. Stais SC and G. Wickens

Instructed by:

Smit Sewgoolam Incorporated

(011 646 0006)

Ref: BVN/MAT32938

Counsel for the Respondent:

Advocate M. R. Hellens SC and J.P. Snijders

Instructed by: BDK Attorneys

(011 838 1214)

Ref: Mr. R.C. Krause/Confident Concepts

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Prepared on 12 October 2026 · Esheria