

SOUTH AFRICA / JUDGMENT

## Knipe v Kameelhoek (Pty) Ltd and Others (2120/2016) [2017] ZAFSHC 116 (22 June 2017)

[2017] ZAFSHC 116

COURT

Free State High Court, Bloemfontein

BEFORE

MH Rampai

CASE / FILE NUMBER

2120/2016

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IN

THE HIGH COURT OF SOUTH AFRICA,  
FREE  
STATE DIVISION, BLOEMFONTEIN

Case

number: 2120/2016

In

the matter between:

ANDRE  
BAZETT JANSEN  
KNIPE  
Applicant  
and  
KAMEELHOEK  
(PTY) LTD  
1st Respondent  
SCHAAPPLAATS  
978 (PTY) LTD  
(in  
liquidation)  
2nd Respondent  
COMPANIES  
AND INTELLECTUAL  
PROPERTIES  
COMMISSION  
3rd Respondent  
HEARD

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ON:08 MAY 2017

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**JUDGMENT**

BY: RAMPAL, J

DELIVERED ON: 22 JUNE 2017

- [1] This is an application for leave to appeal. The applicant endeavoured to have the 1st respondent and the 2nd respondent, the two liquidated family enterprises, placed under business rescue management. His application was dismissed with punitive costs. The applicant was aggrieved by the judgment given and the order made by Hancke J on 3 November 2016.
- [2] On 1 December 2016 the applicant filed notice of his intention to appeal. There were eleven grounds of appeal. There were three entities cited as the respondents. They were: Kameelhoek (Pty) Ltd Schaapplaats 978 (Pty) Ltd; and Companies and Intellectual and Properties Commission.
- [3] On 12 December 2016 three liquidators intervened. They were: Ottlie Anton Noordman N.O.; Chavonnes Badenhorst St Clair Cooper N.O. and Simon Malebo Rampoporo N.O. They intervened as the first, second and third intervening parties, respectively.
- [4] On 13 December 2016 one family member, Carol, JK Lotz ex Knipe also intervened as the fourth intervening party. She is one of the five siblings and shareholders in the family enterprises, the 1st and the 2nd respondents.
- [5] The current application was initially enrolled for hearing on Thursday 16 March 2017. However, it did not proceed. It was postponed by agreement between the parties in an attempt to negotiate some settlement. Those settlement negotiations yielded no positive result.
- [7] On 25 April 2017 the applicant filed an objection in terms of rule 7(1). He objected to the authority of Attorney FJ Senekal of Matsepes Incorporated to represent the first, the second and the third intervening parties. He called upon the attorney to file written proof that he had been authorised to represent the liquidators and written proof that he had been authorised by those liquidators to oppose the current application for leave to appeal.
- [6] The matter was ultimately argued before me on Monday 8 May 2017. The applicant's objection and the main application were opposed by all the four intervening parties. I overruled the applicant's preliminary objection. I then proceeded to entertain the main application. At the end of the argument I reserved judgment.
- [8] Nowadays an application for leave to appeal is governed by the provisions of section 17 Superior Courts Act 10/2013. The

relevant portion of the section provides:

*“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;”

(the emphasis is mine)

That is now the new test.

- [9] Previously an application for leave to appeal was governed by section 20(4) Supreme Court Act 59/1959. However, section 20(4) Act No 59/1959, unlike section 17(1) Act No 20/2013, did not set out any restrictive measure or test in respect of the required leave to appeal. The determinant standard principle in considering whether leave to appeal should be granted or refused was whether a reasonable prospect existed that another court might to a different conclusion. *Van Heerden v Gronwright & Others* 1985 (2) SA 342 (T) at 343H-I.
- [10] The question whether the new section 17(1) heralded a paradigm shift from the old section 20(4) has been recently considered in the *Mont Chevaux Trust (IT2012/28) v Tina Goosen & 18 Others* (2014), (3.11.2014) ZALCC (LCC14R/2014) (CT) par [6] per Bertelsmann J, *Valley of the Kings Thaba Motswere (Pty) Ltd & Another v AL Mayya* (2016) (10.11.2016) ZAHSA (EL 926/2016) (EL) par (3) per Smith J and *Civil & General Contractors CC v Chris Hani District Municipality* (2015) (24.11.2016) ZAHSA (6142/15) (EG).
- [11] There is a logical inconsistency between finding, on the one hand, that section 17 of the Superior Court Act 10 of 2013, has now introduced a more stringent test than in the past for leave, but still continue to apply the old test on the other hand. I am in respectful agreement with the view that a more stringent test as propounded in the decision of *The Mont Chevaux*, *supra*, should now be applied in considering an application for leave to appeal.
- [12] I am here grappling with an application for leave to appeal in terms of section 17(1)(a) of the Superior Courts Act 10 of 2013. The leave is sought to appeal against the whole of the judgment by Hancke J. The judgment concerned two corporate enterprises, namely: *Kameelhoek (Pty) Ltd* (in liquidation) and *Schaapplaats 978 (Pty) Ltd* (in liquidation). Both of these enterprises were placed in final liquidation some years back. The essence of the relief sought by the applicant in the main application was to have the liquidation proceedings relative to those enterprises suspended and the two companies placed under business rescue proceedings in terms of section 131(4)(a) of the companies Act 71 of 2008.

[13] The application for leave to appeal was criticised by the legal representatives of the intervening parties. It was described as a poorly drafted legal document, couched in a terminology akin to that of a notice of appeal. Indeed the application did not deal with the requirements of section 17(1) Act No 10/2013. At the end of all the grounds of appeal an oblique submission was made:

*“It is submitted on behalf of the Applicant that there is a reasonable prospect of another Court coming to a different conclusion in favour of the applicant.”*

[14] Before I consider the grounds of the appeal, I have to make some preliminary comments in connection with the history of the matter. The companies concerned were not wound-up last month. It is common cause that both of these family business enterprises were provisionally liquidated on 30 August 2012, some 52 months before the main application was launched. Both were finally liquidated on 27 June 2013, some 41 months before current application was initiated.

[15] A similar application for leave to appeal was made but refused on 25 September 2013. The Supreme Court of Appeal was approached for leave to appeal. That application too was unsuccessful. It was refused on 5 February 2014.

[16] The first attempt was then made to place the two companies under business rescue management. That similar application was brought some one and half years into the winding-up process. Wright AJ found the delay unacceptable. She found that the business rescue application was not genuine and that it was merely a ploy to further frustrate the liquidation process. The application was accordingly dismissed with punitive costs.

[17] The second attempt for the business rescue schemes was made on 12 May

2016. On 3 November 2016 that second attempt failed. The second application, like the first, was refused. It was refused approximately 45 months since the final liquidation order was granted. Its purpose was to have the liquidation process suspended and the business rescue process commenced in respect of each of the two family enterprises. Therefore, it will be readily appreciated that Hancke J had to grapple with pretty much the same type of an application as Wright AJ did. The similar applications were approximately thirty eight months apart. On this second occasion, the delay was disturbingly inordinate.

[18] Hancke J found, and correctly so, that business rescue proceedings, by their very nature should be conducted with the optimum possible expedition. *DH Brothers Industries v Gribnitz & Others* 2014 (1) SA 103 (KZP) par [27]; *Koen v Wedgwood Village Golf Laundry Estate* 2012 (2) SA 378 (WCC).

[19] Where, as in this instance, a business rescue application competes with a liquidation process, it is incumbent upon the business rescue applicant to show a reasonable prospect that business rescue option will yield a better return than a liquidation option. *Prospect Investments (Pty) Ltd v Pacific coast Investments 97 (Pty) Ltd* 2013 (1) SA 53 (FB). This has not been shown nor can it be shown. Enormous administration costs have been incurred

over the years as a result of the applicant's recalcitrant attitude coupled with endless litigation. The applicant seemed to avoid

this issue. It is a material consideration. The administration costs, I am given to understand, have tremendously escalated to astronomic figures by now. It would, therefore, appear that business rescue cannot be a viable application now – not that it ever was. Now, more than ever before, the survival crisis has lamentably deepen.

[20] When the interests of the company in liquidation, including the wishes of the shareholders, and the interest of the creditors are weighed up those of the creditors should carry the day. The collective body of creditors is the major creditor of the companies

in liquidation. There is no sound reason why they should be compelled to await the uncertainty of the business rescue application

and not be paid the moment the estates are wound-up in accordance with the liquidation and distribution account. Before the

rescue option may even be considered, there has to be a viable business that is worth rescuing. Where there is none- the

rescue mission is not worth a while.

[21] The business rescue application must be brought in good faith and for a proper purpose. It should not be tainted or actuated by an ulterior motive such as to suspend and delay the liquidation process. It must be brought by an applicant with clean hands – Henochsberg: Commentary on the Companies Act; section 131 – General Noted. It appears that the application has as its true purpose the delaying of the winding-up,

to frustrate the liquidators, to spite Carol, to establish a pre-winding-up state where Andre, John and Jacqueline are in control

of the companies to the total exclusion of Carole and then to continue doing with the farms as they please.

[22] An application for leave to appeal has to set out the grounds of the envisaged appeal clearly, succinctly and unambiguously to enable, first and foremost, the respondent and, of course, the court – to be fully appraised of the case which the applicant seeks to make out, which the respondent has to meet, which the court of first instance missed and which the appellate court is invited to uphold – Erasmus: Superior Court Practice, at B1-356. See also Songono v Minister of Law & Order 1996 (4) SA 384 (E) at 385I-J.

[23] On behalf of the 4th intervening party it was submitted that no serious attempt has been made by the applicant, in respect of each ground of appeal, to show why it was ultimately submitted that it was reasonably possible that another court may come to a different conclusion. It was also colloquially submitted, in view of this particular shortcoming alone, that the application for leave to appeal did not come out of the starting blocks. The critique

was not without substance. Now I proceed to examine the grounds of the contemplated appeal.

\*[24] As regards the first ground of appeal, the issue concerned the finding of the court that business rescue management could not be an appropriate remedy in a case of a small, non-trading, and solvent business enterprise. vide par 1.3 notice of application

[25] Mr Van Rensburg, counsel for the applicant attacked the above finding as a misdirection. The foundation of counsel's submission was the court ignored the provision or rather the definition of the concept "business rescue" in section 128(1)(b)(iii) Companies Act 71/2008. The section is located in chapter 6 which specifically makes provision for the restricting of "property" of company in a manner that maximises the likelihood of a company continuing in existence on a solvent basis. Counsel further also argued that the first and the second respondents could not, by any stretch of imagination, be correctly regarded as small companies because, as counsel said, their combined capital value was approximately R80,0 million.

[26] Mr Preis, counsel for the first, second and third intervening parties, supported the finding of the court. Counsel contended

that indeed intervention by way of business rescue management could not be an appropriate remedy for the two sister companies already

deactivated by the debilitating impact of the liquidation proceedings. The underlying reason for the finding was that it

was just and equitable to all concerned to wind-up the two family companies because of the acrimonious infighting among the shareholders.

[27] Mr Halgryn, counsel for the 4th intervening party, also supported the finding. Counsel contended that the applicants first ground of appeal did not take

into account a significant related finding by the court which finding was previously made by the full bench of this division. The finding was that the companies concerned were designed to be family business enterprises operated on the basis of equal participation of all the sibling shareholders.

[28] Implicit in that equal participatory mode of corporate governance was the notion of ultimate mutual benefits. It is a lamentable state of affairs to see just how the five shareholders, as siblings have been incapable of understanding that very basic fact. This is a material consideration. No court can disregard it as irrelevant. It is not irrelevant, it has never been and it never will. It still arguably remains one most important factor which has to be taken into account in adjudicating the application at hand. In my view it was correctly taken into account by Hancke J.

[29] It was, on no less than three previous occasions, considered relevant by the court of first instance, Daffue J, by Wright AJ, and by the full bench of this division. Above all these, it was also considered relevant by the big brother, the Supreme Court of Appeals. It must be readily appreciated, therefore, that Hancke J was in good company. As I see it, the issue is no longer open for any debate anymore. I am not persuaded that another court may hold differently in the future.

[30] In desperate attempt to persuade me that the companies were not small domestic entities, the applicant sought to argue that the combined capital value of the two farms was about R80,0 million. The figure was comparatively a whole lot higher than his previous estimate as stated in the founding affidavit. Whether the true value was R17,7 million or R21,0 million or R80,0 million, on the open market the companies remained small in the sense that together they have only five shareholders.

- “anx 1” p213-4 Hancke J.

[31] The companies have no employees. They do not actively trade. They own two farms. Accordingly, there is no trading business enterprise to be rescued. These were the circumstances when the first business rescue application was launched about three or so years ago. These are still the prevailing circumstances today. Virtually nothing has changed between the first and the second business rescue applications. See *First Rand Bank v Normandie Restaurants* [2016] (189/2016) ZASCA 178 (25.11.2016).

\*[32] As regards the second ground of appeal, the issue revolved around the family fued. The founding siblings are Andre, Johnny, Jacqueline, Carol and Pieter.

They are the five Knipe children.

[33] Mr Van Rensburg had this to say about the family fued:

*“The honourable judge also overemphasized the reasons advanced by Daffue J in the liquidation proceedings ... that it is ... just and equitable to liquidate the companies due to the (then family fued. It is with respect submitted that the honourable judge erred in not taking into account that the applicant secured the support of three of the five siblings, thereby having 80% of the shareholders supporting the business rescue application.”*

[34] It was common cause that prior to the provisional liquidation order, the three siblings, namely: Andre, Johnny and Jackie called the shots. They managed the business affairs of the family companies to the exclusion of the other two siblings, namely;

Carol and Pieter. The two were marginalized. There was virtually no meaningful dialogue between the two hostile factions of the siblings. Such disintegration of familial bounds negatively affected the farming operations to the detriment of all the siblings. Hancke J held that the siblings could not approach any issue relative to the companies with open minds and in utmost good faith as one would ordinarily expect from siblings. The relational conflict created a rift too deep to bridge at this juncture.

- [35] Some of the siblings ignored the reality that the companies, designed to be family enterprises, were rooted on the solid foundation of equal and participative management by all the siblings.
- [36] It was contended by the applicant that the court erred by not taking into account that the applicant had secured the support of three of his four siblings. The point being that in the second business rescue application before Hancke J, unlike in the first business rescue application before Wright AJ, 80% of the shareholders support the business rescue application and that only 20% of the shareholders was opposed to such a scheme. Consequently it was submitted that Carol's refusal to cooperate with the business rescue practitioner would be of no significance seeing that she would be a minority shareholder, the proverbial voice in the wilderness, so to speak.
- [37] The applicant's contentions were flawed. Hancke J never made a finding to the effect that the support of all the five shareholders was necessarily required for a business rescue application to succeed. What Hancke J correctly found was that the interest of all the stakeholders should be considered including but not limited to those of the shareholders who opposed the business rescue application. Hancke J first quoted section 7(k) Companies Act 71/2008. The section requires the balancing of the interest of all stakeholders. It is, therefore, clear and obvious, that his lordship correctly applied the principle.
- [38] Moreover, the founding values of equal participation and equal decision-making by all the siblings as stakeholders, militates

against the application of the principle that majority rules. There is simply no room for such a principle in these family

enterprises. It must be kept in mind that business rescue management, even if it were granted, would not be a permanent feature

of the farming operations of the companies. At some point the business rescue practitioner would be bound to vacate his post and hand the rehabilitated companies back to the sibling shareholders. Given the peculiar acrimonious of the siblings, the most likely prediction is that the family feud would erupt once again. That is a material consideration.

- [39] The court held that business rescue management spearheaded by a business rescue practitioner could not and was not designed to remedy the ailment which caused the rot in the family enterprises now in liquidation. The ailment appeared to be incurable. The rot stemmed from deep distrust, frequent deadlock, bitter family feud, intense hatred and endless litigation among the shareholders.

This sad state of affairs has had a drastically adverse impact on the otherwise enormous and opulent legacy bequeathed to the five sibling shareholders by their industrious and incredibly successful parents. These siblings will live to regret all these.

[40] The above analysis and conclusion is fortified by the definition of “business rescue” in section 128(b) Act No 71/2008. According to the section, business rescue “means proceedings to facilitate the rehabilitation of a company that is financially distressed ...”

(my own emphasis.)

If I followed the argument of Mr Preis and Mr Halgryn very well, and I think I did, the family enterprises were not really wound-up because they were in irredeemable financial distress. Instead they were finally wound-up on account of the absolute destruction of the personal relationship(s), mutual co-operation trust, and confidence among the siblings who were anointed, with great parental affection, as shareholders.

[41] Those destructive forces of the incurable ailment made it very difficult, if not practically impossible, for the companies to be run and managed in a financially sound manner. It must be obvious, therefore, that relational distress and not financial distress wrecked the family ship on its voyage to the treasure island. The apparent failure on the part of the siblings to rehabilitate their broken family ties was the determinant factor which informed the original decision of the court to wind up the family companies.

\*[42] The third ground of the appeal was that the court erred by finding that the support of all the stakeholders was required in order to ensure that the business rescue scheme succeeds. – vide par2

[43] Mr Halgryn contended that the court never made such a finding. During the course of his argument, Mr Van Rensburg did not contend otherwise.

[44] There was substance in Mr Halgryn’s contention. All that the court found was that the interest of all the stakeholders should be considered in determining whether or not the scheme should be approved or not. Included in such interests were those of the stakeholders opposed to the scheme. Among them were the liquidators or creditors and the shareholders.

[45] It is to be stressed that the court, by way of introduction, quoted the provision of section 7 of the Companies Act 71 of 2008. One of the several purposes of the statute is to:

*“provide for the efficient rescue and recovery of financially distressed companies, in a manner that balances the rights and interests of all relevant stakeholders.” - Section 7(k)*

There can be no reasonable doubt, that the court correctly applied the principle by taking into account the interests of all the relevant stakeholders.

\*[46] The fourth ground was that the court erred by finding that the support of the shareholders was required when a business rescue plan is considered – vide par3.

[47] Again Mr Halgryn contended that the court never made such a finding. The contention remained undisturbed at the end of the oral argument. It must, therefore, be accepted as correct. But over and above that, it must be recognised that the mere fact that shareholders have no vote when a business rescue plan is considered in terms of section 152 is, in itself, a

factor which weighs heavily against the grant of the business rescue application. In this instance, the liquidators as the major creditors, are outspoken about their resolve to vote against such a plan should the current application succeed. Of course, they – unlike the shareholders, are fully entitled to do so.

\*[48] The fifth ground was that the winding-up of the companies would have destructive consequences as opposed to the constructive advantages of the rehabilitative redemption of the companies. - vide par 4.

[49] I am persuaded by the argument of both counsels for the intervening parties. The alleged misdirection was no ground of appeal. The reasons for the winding-up cannot be sufficiently over-emphasized. In the circumstances of this case, they

exceedingly outweigh any conceivable advantage of the plan, which, upon its termination, will ultimately require the mutual cooperation

of all the sibling shareholders.

[50] Indeed any “possible destructive consequences caused by liquidations” is not even a consideration. Firstly the companies could have been wound up many years ago before, their estates were so financially diminished. Winding-up the

companies was elementary business. It would have been uncomplicated, efficient and cost-effective. But for the endless litigation, the liquidators would have accomplished the mission long ago. All that was required was to have all the cattle, game and farms liquidated, and the proceeds paid to the creditors and dividends distributed among the shareholders.

[51] It cannot be disputed that the costs relative to the administration of the two companies in liquidation, have tremendously escalated over the years. Such costs can correctly be described as destructive consequence. However, they cannot be fairly regarded as the destructive consequences of the liquidation process.

[52] On the contrary, they can be objectively regarded as the destructive repercussions of retarding the liquidation process. For those adverse financial repercussions, the applicants and his siblings, with the exception of Carol, have only themselves to blame. The horse has thus bottled. It is now too late to close the gate.

\*[53] The sixth ground was that the court erred by finding that the family dispute of the past was a valid reason for refusing the application for the business rescue of the two family companies whereas the future was not that bleak. - vide par 5.

- [54] The ongoing family dispute appeared to me and to the court to be an insurmountable hurdle against any endeavour to have the financially distressed companies successfully rescued. The turbulent history of the family is largely uncontested. Any denial of that history would be palpably untruthful. It is so relevant that it cannot be wished away. The applicant himself correctly acknowledges that a proper and harmonious working relationship among the siblings is impossible.
- [55] That admission sounds a death knell for any business rescue application. At the heart of it all was the control and management of the companies. The business enterprises were conducted by the applicant, Mr Andre Knipe, his twin brother Mr Johny Knipe, and his sister, Ms Jacqueline Vigne to the total exclusion of their sister, Ms Carol Lotz and their brother Mr Pieter Knipe.
- [56] It should also be constantly borne in mind that statutory intervention by way of business rescue scheme is a temporary remedy – section 128(b) Act No 71/2008. Even if a business rescue practitioner may restore peaceful management and conducive cooperate ethos during his or her temporary tenure on the farms, at some stage he will have to go and return the day-to-day management of the companies to the directors.
- [57] In *D.H Brothers Industries (Pty) Ltd v Gribnitz N.O and Others* 2014 (1) SA 103 (KZP) par [26] Gorven J stated:

*“[26] Business rescue proceedings place a moratorium on creditors enforcing their claims against the relevant company. This, of course, amounts to a legislative intrusion into a contractual relationship between parties. It is therefore an incursion into existing-law territory. It is a well-worn tenet of our law that the legislature does not intend to alter the existing law more than is necessary, particularly if it takes away existing rights. There is a presumption against any forfeiture of rights.”*

- [58] In pretty much the same vein Binns-Ward J had previously remarked:

*“It is axiomatic that business rescue proceedings, by their very nature, must be conducted with the maximum possible expedition. In most cases a failure to expeditiously implement rescue measures when a company is in financial distress will lessen or entirely negate the prospect of effective rescue. Legislative recognition of this axiom is reflected in the tight time lines given in terms of the Act for the implementation of business rescue procedures if an order placing a company under supervision for that purpose is granted. There is also the consideration that the mere institution of business rescue proceedings — however dubious might be their prospects of success in a given case — materially affects the rights of third parties to enforce their rights against the subject company.”*

*Koen and Another v Wedgwood Village, Golf, country Estate (Pty) Ltd & Others* 2012

- (2) SA 378 (WCC) par [10].

The plans put forward by the applicant do not accord with the nature of the business rescue proceedings as elucidated in the decisions I have quoted above.

- [59] On behalf of the intervening parties, it was also argued, that there was no indication, let alone a guarantee, of how the costs of the business rescue proceedings would be paid. The companies do not have cash. Their farms are now their only assets. The argument was never challenged. This is not a case where a higher or appellate court should be called upon to interfere with the discretion exercised against the grant of business rescue relief – Oakdene Square, *supra*, par [18] and [21].
- [60] Mr Preis argued that if business rescue application were granted, much greater amounts would be expended to rehabilitated the now financially distressed companies than if their assets were sold in the course of winding up the companies. The informed estimate was that the difference would be in excess of R2,0 million. The figure was a realistic indication that liquidation would be more beneficial to the shareholders and creditors than business rescue.
- [61] There exists a reasonable apprehension that on resumption of control of the companies, the pre-winding-up family fued, in all its ugliness, would once again rear its ugly head. Because, as they say – the question of money always rears its ugly head in matters of business. This is a material consideration. The say-so of the twins and their supportive sister that they will step aside and back up the appointment of independent directors, gives no joy to their other unsupportive sister, Carol. She totally disbelieves them. To her the assurance of her previous oppressors means absolutely nothing. She fears, for perfectly understandable reasons, that nothing will prevent them from removing the proposed independent directors and from re-appointing themselves once again as directors. They have already started running the 4-1 victory lap since they won the support of Mr Pieter Knipe, who was Carol's only ally. Their reliance on their newly acquired numerical strength underlines the danger. They will not hesitate to invoke their increased majority voting power in the future to remove the proposed independent directors in order to exclude Carol and call the oppressive shots yet again.
- [62] Mr Halgryn argued that the current application was more important for what was unsaid than what was actually said:

*“He and his fellow sibling shareholders want the farms to return to the state prior to their winding-up, where they were in control of it, after unlawfully spoliating Carol, appointing themselves as the directors and then going on an illegal shooting spree of cattle and game on a scale which is mind-boggling and removing the carcasses with (sic) cool trucks – all of this, whilst telling Carol to shut up – as she was only in the minority.”*

The submission is compelling.

\*[63] The seventh ground of appeal was that the opposing affidavit of Ms Carol Lotz and that of Mr Senekal

*“are almost a carbon copy of each other”.*

According to the applicant the similarity was so striking that it indicated or as he put it

*“... confirmed the fact that there is collaboration between the liquidators, as represented by Mr Senekal, and Ms Carol Lotz” – vide par 6.*

[64] The fact that one sibling shareholder says what she says about her fellow sibling shareholders – speaks volumes. She regards her siblings as

*“thugs, bullies and thieves who made her parent’s life hell during their lifetime.”*

vide par 94 of her answering affidavit on p716 of the record.

Referring to her twin brothers and sister, she said the following:

*“They hate me as much as I hate them.” Vide par 100 on p717 record.*

[65] It cannot be said that the court committed any material and appealable misdirection in those circumstances. Certainly the point belatedly complained of, cannot be regarded as a ground of appeal. I am persuaded that it has no merit.

\*[66] The eight ground was that the intervening parties were so hell-bend on opposing the proposed business rescue scheme that they would do so irrespective of its prospects of success. - vide par 7.

[67] The opponents of this application argued that the point suffered from lack of sufficiency of details. The allegations regarding the proposed business rescue schemes were pitifully vague. Yet again the critique was levelled at the conduct of the intervening parties and not the reasons of Hancke J for the order he made. The point was no valid ground of appeal, in my view.

\*[68] The ninth ground was that the court should have found but failed to find that the intervening parties had no good intentions to act in the best interest of the companies. - vide par 8.

[69] On behalf of the intervening parties it was contended that the court was correct in finding that the applicant’s conduct in applying again for the business rescue schemes of the companies constituted an abuse of process. Hancke J took such a dim view of the conduct of the applicant that he showed his displeasure with a punitive costs order.

[70] Mr Preis submitted that the issues currently relied upon were never previously raised on the papers; that it was legally

impermissible to do so in this manner; that the applicant’s submission was without merit; and that the application for leave to appeal constituted frivolous and vexatious litigation. Counsel described the application as a contrived afterthought primarily designed to suspend the winding-up process and to frustrate its finalization. I am inclined to agree.

[71] Mr Halgryn was also dismissive of this particular point. He too described it as a frivolous point. He stressed that the reason why Wright AJ dismissed the applicant's first application for the rescue of the family business was significant. Her lordship found, and correctly so, that the applicant's delay was in excusable. If that is so, then the current delay, whose magnitude was more than double the delay in the applicant's first similar application, is fundamentally more destructive and totally inexcusable.

\*[72] The tenth ground was no ground of appeal at all. It was not based on allegations contained in any of the affidavits. Consequently it constituted new matter which was procedurally and legally not supposed to be raised in this unprocedural fashion.

[73] That being the case, the point deserves no further attention, seeing that the point was never argued before Hancke J. The contention that the point constituted new, scandalous and vexatious material was sound.

\*[74] This completes my consideration of the grounds of appeal. Now I proceed to miscellaneous issues such as the conclusion; the costs and the order. It was submitted that no case had been made out for the relief sought in pars 10 and 11 of the applicant's

notice. I am persuaded that there exists no possibility that another court would interfere with the various findings earlier made by the court and subsequently attacked by the applicant in these proceedings. I am not persuaded that the delay was chiefly occasioned by any other factor other than the applicant's own conduct.

[75] Given all the peculiar circumstances of this particular case, I am inclined to conclude that an appeal, against the second refusal to have the companies placed under business rescue management, would not have a reasonable prospect of success. Moreover, there is virtually no other compelling reason why leave to appeal should be granted.

[76] As regards costs, the parties urged me, obviously for different reasons, to award costs on the special scale as between attorney and client. More compelling circumstances than those of the current application are rare to find. The four intervening parties have emerged victorious – consequently they are entitled to the fruit of their success. This application for leave to appeal – over and above the fact that it was fatally flawed and exceptionally late – it was as spurious as the main application for the business rescue remedy itself. I would, in these circumstances, award costs on a punitive scale in favour of the four intervening parties. The reserved costs of 16 March 2017 are included.

[77] In view of all these considerations, I am not persuaded that Hancke J committed any material and appealable misdirection as alleged or on any other ground whatsoever be it on any question of law or on any matter of fact. I am of the opinion that the contemplated appeal would have no reasonable prospect of success on appeal. I am also of the opinion that there is no other compelling reason why the higher or appellate court should be burdened with the hearing of such an unmeritorious appeal. Leave to appeal may only be given provided the applicant passes the test in terms of ss1(a)(i) reasonable prospect or

ss1(a)(ii) some other compelling reason. In my view the applicant failed the requisite stringent test in terms of sec 17. It follows, therefore, that in the absence of either a reasonable prospect or a compelling reason, no other court may come to a different conclusion. I would, consequently refuse leave to appeal.

[78] Accordingly I make the following order:

1. The applicant's application to have the first and the second respondents placed under business rescue management is refused.
2. The applicant pays the costs hereof, on the punitive scale as between attorney and client.
3. Such costs shall include the wasted costs occasioned by the postponement of the 16 March 2017.

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MH RAMPAL, J

On behalf of applicant:

Adv FG Janse van Rensburg

Instructed by:

Horn & Van Rensburg

Bloemfontein

Stuart van der Merwe Incorporated

Pretoria

On behalf of 1st, 2nd & 3rd intervening parties: Adv DA Preis SC

Matsepes Incorporated

On behalf of the 4th intervening party: Adv L Halgryn SC

Instructed by:

Lovius Block

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