

SOUTH AFRICA / JUDGMENT

MBT Petroleum (Pty) Ltd v Shalom Afslaers CC (M622/2021) [2022]

ZANWHC 41 (14 October 2022)

[2022] ZANWHC 41

COURT

North West High Court, Mafikeng

BEFORE

R D Hendricks

CASE / FILE NUMBER

M622/2021

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IN

THE NORTH WEST HIGH COURT, MAHIKENG

CASE

NO: M 622 /2021

Reportable:

NO
Circulate
to Judges: NO
Circulate
to Magistrates: NO
Circulate
to Regional Magistrates: NO
In

the matter between:

MBT
PETROLEUM (PTY) LTD
Applicant
and
SHALOM
AFSLAERS CC
Respondent
DATE
OF HEARING
07
OCTOBER 2022
DATE
OF JUDGMENT
14
OCTOBER 2022

COUNSEL
FOR APPLICANT
ADV.
PRINSLOO
with
ADV. JACOBS
COUNSEL
FOR THE RESPONDENT
ADV. SWANEPOEL SC
with
ADV. BOONZAAIER

JUDGMENT

ON LEAVE TO APPEAL

Delivered: This judgment was handed down electronically by circulation to the parties' representatives via email. The date and time for

hand-down is deemed to be 10H00 on 14 OCTOBER 2022.

ORDER

Consequently, the following order is made:

- (i) Leave to appeal to either the Full Court of this division or to the Supreme Court of Appeal (SCA) is refused.
- (ii) The applicant is ordered to pay the costs of the application for leave to appeal. Such costs to include the costs consequent upon the employment of two (2) counsel (Senior and Junior) on a party- and-party scale and to be taxed.

JUDGMENT

HENDRICKS JP

Introduction

- [1] This is an application for leave to appeal against the judgment of this Court in which the application for liquidation of the respondent was dismissed with costs. Leave is sought to either the Full Court of this division or to the Supreme Court of Appeal (SCA), as submitted by counsel who act on behalf of the applicant from the bar, although in the "Notice of Appeal" leave is sought only to the SCA. This Court, so it was correctly contended, does have a discretion to grant leave to either the Full Court of this division or to the SCA, in the event that leave be granted.
- [2] The application for leave to appeal is premised on the following grounds of appeal:

“1. The Honourable Judge erred in dismissing the application for the winding-up of the Respondent;

2. The Honourable Judge should have ordered that the Respondent be wound-up, alternatively that the Respondent be placed under provisional winding-up.
3. The Honourable Judge erred in finding that a dispute subsists in respect of the Respondent's indebtedness towards the Applicant.
4. The Honourable Judge should have found that, at best for the Respondent, it disputes a portion of the R2,638,556.97 in respect of petroleum and lubricant products sold and delivered by the Applicant to the Respondent.
5. The Honourable Judge should, further, have found that the amount of R393,591.47 in respect of the Buzz Café agreement is not disputed at all by the Respondent and that the Respondent is indebted to the Applicant in aforesaid amount.
6. The Honourable Judge should have found that the Respondent conflates its alleged claims against the Applicant, as set out in the particulars of claim in the action instituted by the Respondent against the Applicant in the Gauteng Division of the High Court under case number 3577/22, with a dispute regarding the existence of the Applicant's claims.
7. The Honourable Judge should, therefor, have found that the Applicant is a creditor of the Respondent for purposes of Section 69(1)(a) of the Close Corporations Act.
8. The Honourable Judge erred in finding that the fact that the sum of R3 million was deposited into the trust account of the Respondent's attorney of record result therein that the matter is distinguishable from matters where reliance is place on a counterclaim.
9. The Honourable Judge, further, erred in finding that there was unconditional payment of the amount of R3.3 million into the trust account of the Respondent's attorney of record, alternatively that an unconditional tender for payment was made.
10. The Honourable Judge should have found that the fact that the Respondent deposited the sum of R3,032,148.44 into the trust account of its attorney of record, with a so-called unconditional tender to pay whatever the Respondent may be found to owe the Applicant, if anything, does not:
 - 10.1. detract from the fact that the Applicant remains a creditor of the Respondent;
 - 10.2. equate to payment by the Respondent to the Applicant;
 - 10.3. de facto constitute an unconditional tender of payment of the Applicant's claims, as envisaged in *Body incorporate of Fish Eagle v Group Twelve Investments 2003 (5) SA 414 WLD*.
11. The Honourable Judge should have found that the dispute raised by the Respondent are analogous to the scenario catered for in Uniform court rule 22(4) where a defendant raises a counterclaim as defence.

12. The Honourable Judge should have found that the 'principles set out in paragraphs [7] to 1131 of *Afgri Operations Ltd v Hamba Fleet (Pty) Ltd* 2022 (1) SA 91 (SCA) at paragraphs [7] to [13] apply in casu.
13. The Honourable Judge should, therefore, have found that the mere recourse to the alleged claim(s) by the Respondent against the Applicant was not sufficient to enable the Respondent to successfully resist the application for its winding-up.
14. The Honourable Judge should have found that the existence of the Respondent's unliquidated claims is nothing more than the putting up by the Respondent of a basis upon which it was able to ask the Honourable Court to exercise its discretion against making a winding-up order.
15. The Honourable Judge should, therefor, have found that, in the circumstances of the application, the winding-up of the Respondent is an appropriate procedure, as opposed to circumstances where the Badenhorst rule applies.
16. The Honourable Judge should have found that the Respondent did not put up facts to persuade the court to exercise the court's discretion to refuse the winding-up order, inter alia, as the Respondent did not make disclosure of its financial position and/or rebut the presumption that it is unable to pay its debts.
17. The Honourable Judge should have found that the Respondent has failed to pay the admitted debt.
18. The Honourable Judge should have found that no facts were disclosed by the Respondent to show that the court's narrow discretion is to be exercised in its favour.
19. In regard to aforesaid, the Honourable Judge should, inter alia, have taken cognizance of the fact that the Respondents is deemed to be unable to pay its debts, in terms of the provisions of Section 69 (1)(a) of the Close Corporation Act, and made no disclosure of its financial position to rebut the presumption."

Adv. Swanepoel SC took issue with the formulation of these grounds of appeal. I am however of the view that these grounds set out with sufficient particularity the issues appealed against.

- [3] The common law test for leave to appeal was whether there are reasonable prospects that another court, given the same set of facts, may or might arrive at a different conclusion. The common law test has now been codified in the Superior Court Act 10 of
2013. In terms of Section 17(1)(a)(i) and (ii) of this act, leave to appeal may only be granted where the judge is of the opinion that the appeal would have a reasonable prospect of success, or when there are compelling reasons that the appeal should be heard, including conflicting judgments on the matter under consideration.

The use of the word would raises the bar of the test that now has to be applied to the merits of the appeal, before leave can be granted.

See: • The Mont Chevaux Trust (IT2012/38) v Tina Goosen

(unreported LCC Case No. LCC14R/2014 dated 3 November 2014).

- Acting National Director of Public Prosecution v Democratic Alliance (unreported GP Case No. 19577/09 dated 24 June 2016) at par [25].
- Notshokovu v S (unreported SCA Case No. 157/15 dated 7 September 2016);
- Democratic Alliance v The President of the Republic of South Africa (unreported GP Case No. 21424/2020) dated 29 July 2020 at par [4];
- Magashule v Ramaphosa 2021(3) All SA 857 (GJ) (a decision of the Full Court) at par [5].
- Ramakatsa and Others v African National Congress (unreported SCA Case No. 724/2019) dated 31 March 2021 at par [10].

- [4] An applicant faces a higher and more stringent threshold in terms of Section 17 (1) than what used to be the test in terms of the previous Supreme Court Act 59 of 1959, which is repealed. The test of reasonable prospects of success postulates a dispassionate decision, based on the facts and the law that a court of appeal ‘would’ reasonably arrive at a conclusion different to that of the trial court. Its prospects of success must not be remote, but there must exist a reasonable chance of succeeding on appeal. An applicant who applies for leave to appeal must show that there is a sound rational basis for the conclusion that there are reasonable prospects of success on appeal.
- [5] This Court has, in its Reasons for Judgment, dealt comprehensively with the rationale underlining the decision arrived at. The issues raised in the grounds of appeal, (in the application for leave to appeal), were extensively dealt with in the main judgment and same need not be rehashed herein, save to state that the ratio decidendi can be regarded as being incorporated herein, to reach the conclusion. It was inter alia contended on behalf of the applicant by Adv. Prinsloo, that the debt was due and payable and that the indebtedness was not disputed. Furthermore, that the tender was not unconditional and therefore, the applicant was entitled to a liquidation order been granted in its favour. The Badenhorst principle as enunciated in the case of *Badenhorst v Northern Construction Enterprise (Pty) Ltd* 1956 (2) SA 346 (T) does not find application in this matter as it was distinguishable from the facts in the aforementioned Badenhorst case. I am holding a different view.
- [6] This Court has carefully considered each of the grounds of appeal and concluded that on both requirements as enunciated in Section 17 (1)

- (a) (i) and (ii), the application for leave to appeal should fail. There are no reasonable prospects of success on appeal that another court would come to a different decision than what this Court had arrived at on the facts of the matter, neither is / are there any compelling reason(s) that the appeal should be heard. Therefore, the applicant fail to meet the required standard for leave to appeal to be granted to either the Full Court of this division or the Supreme Court of Appeal (SCA).
- [7] Insofar as costs are concerned, same should follow the result, as there exists no plausible reason to order otherwise. Seeing that leave to appeal being refused, the applicant must pay the costs of the application for leave to appeal. Because of the importance of this case to both parties and because of its complexity, the employment of senior counsel and to that extent also two counsel (senior and junior) was warranted. The costs order should therefore include the costs consequent upon the employment of two (2) counsel (Senior and Junior).

Order

[8] Consequently, the following order is made:

- (i) Leave to appeal to either the Full Court of this division or to the Supreme Court of Appeal (SCA) is refused.
- (ii) The applicant is ordered to pay the costs of the application for leave to appeal. Such costs to include the costs consequent upon the employment of two (2) counsel (Senior and Junior) on a party- and-party scale and to be taxed.

R D HENDRICKS

JUDGE PRESIDENT OF THE HIGH COURT,

NORTH WEST DIVISION, MAHIKENG.

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Prepared on 9 October 2026 · Esheria