

SOUTH AFRICA / JUDGMENT

James and Another v Van der Westhuizen N.O and Others (66148/18) [2020] ZAGPPHC 273 (29 June 2020)

[2020] ZAGPPHC 273

COURT

North Gauteng High Court, Pretoria

BEFORE

C J Collis

CASE / FILE NUMBER

66148/18

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IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

- (1) REPORTABLE: NO
- (2) OF INTEREST TO OTHER JUDGES: NO
- (3) REVISED.

CASE NO: 66148/18

In the matter between:

CLIVE EDWARD JAMES FIRST

APPLICANT

ENGELA JAMES

SECOND

APPLICANT

and

KOBUS VAN DER

WESTHUIZEN N.O. FIRST

RESPONDENT

WILLIES ENRICO PRINS N.O.

SECOND RESPONDENT

TSWANE TRUST CO. (PTY) LTD

THIRD RESPONDENT

B3 AIR CONDITIONING (PTY) LTD

FOURTH RESPONDENT

THE MASTER OF THE HIGH COURT, PRETORIA

FIFTH RESPONDENT

JUDGMENT:

APPLICATION FOR LEAVE TO APPEAL

COLLIS J:

INTRODUCTION

- [1] In the present application, the first and second applicants are seeking leave to appeal the judgment of this court handed down on 27 January 2020.[1]
- [2] The application is premised on the grounds as listed in the Application for Leave to Appeal dated 17 February 2020.

LEGAL PRINCIPLES

- [3] Section 17 of the Superior Court's Act provides as follows:[2]
- (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;
- (b) the decision sought to appeal does not fall within the ambit of section 16(2)(a);
- (c) where the decision sought to be appealed does not dispose of all the issues in the case, the appeal would lead to a just and prompt resolution of the real issues between the parties.
- [4] As to the test to be applied by a court in considering an application for leave to appeal, Bertelsmann J in *The Mont Chevaux*

Trust v Tina Goosen & 18 Others 2014 JDR 2325 (LCC) at para 6 stated the following:

‘It is clear that the threshold for granting leave to appeal against a judgment of a high Court has been raised in the new Act. The former test whether leave to appeal should be granted was a reasonable prospect that another court might come to a different

conclusion, see *Van Heerden v Cronwright & Others* 1985 (2) SA 342 (T) at 343H. The use of the word “would” in the new statute indicates a measure of certainty that another court will differ from the court whose judgment is sought to be appealed against.’

- [5] ‘In order to succeed, therefore, the appellant must convince this Court on proper grounds that he has prospects of success on appeal and that those prospects are not remote, but have a realistic chance of succeeding. More is required to be established than that there is a mere possibility of success, that the case is arguable on appeal or that the case cannot be categorised as hopeless. There must, in other word, be a sound, rational basis for the conclusion that there are prospects of success on appeal.’[3]
- [6] The applicants and the respondent on request by this court filed written Heads of Argument in order to facilitate the virtual hearing of the matter.
- [7] I do not propose to deal with each and every ground advanced by the applicants in this application for leave to appeal. However, what I propose to do is to deal with, in my view, that which disposes of this application in its entirety.

BACKGROUND

[8] As per the Notice of Motion, the applicants sought the following relief:

- 8.1 that the appointment of the joint liquidators be set aside;
- 8.2 that the fifth respondent appoints an objective and impartial liquidator other than the first, second and third respondents;
- 8.3 that claim 1, submitted at the first creditors meeting by the fourth respondent on 7 June 2017 be found to be ultra vires and of no force and effect by virtue of a summary judgment order granted after date of the winding up of the company;
- 8.4 that the proceedings and inquiries currently instituted be stayed.[4]

APPLICANTS’ SUBMISSIONS

- [9] Counsel for the applicants contended that leave to appeal should be granted in that the appeal would have a reasonable prospect of success. In essence the grounds advanced by the applicants in seeking leave to appeal is that the liquidators have failed to investigate the factual basis and source material to the claim (the summary judgment) specifically with regards to annexure ‘CEJ 9’ which had been known and available to them. Furthermore, that their failure constitutes a breach of their duties of trust to all parties and that they acted reckless by just merely accepting the amount as per the summary judgment. By the liquidators merely accepting the amount constitutes misconduct, which would grant the

applicants locus standi to approach the court for their removal. In addition to this, the applicants would have no locus standi to apply for a rescission of the summary judgment application as these prerogatives falls squarely within the powers of the appointed liquidators of the company. Furthermore, that at common law, the applicants have a right to challenge the liquidator as they stand in a fiduciary position towards all parties involved. It is on this basis that the applicants contend that they ought to be granted leave to appeal.

RESPONDENT'S SUBMISSIONS

[10] On behalf of the respondents, counsel had argued that the claim accepted by the trustee in terms of section 45 of the Act is a claim as presented by the fourth respondent at the first creditors meeting and that the basis relied upon was for services rendered and not the summary judgment order. At this meeting, it is common cause, that the applicants were absent. This claim, it was submitted by the respondents, were validly received and not properly challenged by the applicants. Furthermore, that the Master at the meeting had found this claim upon examination to be valid and by their absence at this meeting, had found that it was not properly challenged by them. In addition to this, that the removal of a liquidator by the Master is dealt with in terms of section 379 of the Companies Act 61 of 1973 and that a Court will not remove a liquidator unless it is satisfied that a proper case has been made out by evidence; that it is against the interest of all persons who are interested in the company being liquidated that he remains in office.

[11] In *Ma-Afrika Groepbelange (Pty) Ltd v Millman and Powell* NNO 1997 (1) SA 547 (C), the Court held as follows:

"It goes without saying that the removal of a liquidator is a radical form of relief which will not be granted unless the court is

satisfied that a proper case is made out therefore. In this regard it will not be sufficient merely to show that there is an apprehension

or perception of bias, partially, lack of independence or unfairness on the part of the liquidator. Nor would it suffice to establish,

even prima facie, that the liquidator has not performed satisfactorily, has made questionable decisions, or committed errors of judgment. This may well point to a lack of competence or experience, but will not necessarily be regarded as 'good cause' justifying the removal of the liquidator. The court is obliged to assess the conduct of the liquidator in its full context with reference with all the relevant facts and circumstances. And at the end of the day it is of cardinal importance that the court must

be satisfied, that the removal of the liquidator is to the general advantage and benefit to all persons concerned or otherwise

interested in the winding up of the company in liquidation. In this regard a relevant factor is the expense which will be incurred and the inconvenience suffered to appoint a new liquidator for the purposes of completing the work already done by his predecessor. A court would hence be less inclined to remove a liquidator at a late stage in the winding-up process than it would be to replace him at an early stage.”

[12] This court being mindful of the rationale as set out above, concluded that the applicants have failed to persuade it that a basis exists to entitle them to the relief as set out in the notice of motion. The request for such removal was certainly not borne out by the evidence presented before this court.

[13] It as a result must follow that the appeal would not have a reasonable prospect of success.

ORDER

[14] Consequently I make the following order:

14.1 The application for leave to appeal is dismissed, with costs.

C. J. COLLIS

JUDGE OF THE HIGH COURT

GAUTENG DIVISION PRETORIA

APPEARANCES:

FOR APPLICANTS: ADV.Z.

PANSEGROUW

INSTRUCTED BY:

PRITCHARD ATTORNEYS INC

FOR FIRST TO

THIRD RESPONDENTS:

ADV. J. HERSHENSOHN

INSTRUCTED BY: BRAZINGTON

& McCONNELL

& ASSOCIATES INC.

DATE OF HEARING: 29

MAY 2020

DATE OF JUDGMENT: 29

JUNE 2020

Judgment

electronically transmitted.

[1] Judgment Collis J delivered 27 January 2020

[2] Act 10 of 2013

[3] S v Smith 2012 (1) SACR 567 (SCA) at para 7

[4] Notice of Motion p 2

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Prepared on 11 October 2026 · Esheria