

SOUTH AFRICA / JUDGMENT

Van Zyl N.O and Another v Cometa Trading (Pty) Ltd (Leave to Appeal) (4425/24) [2025]

ZAWCHC 112 (17 March 2025)

[2025] ZAWCHC 112

COURT

Western Cape High Court, Cape Town

BEFORE

Montzinger

CASE / FILE NUMBER

4425/24

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IN THE HIGH COURT OF
SOUTH AFRICA
WESTERN CAPE DIVISION,
CAPE TOWN

Case number: 4425/24

In the application

between:

THOMAS
CHRISTOPHER VAN ZYL N.O.
First
Applicant
DEIDRE
BASSON N.O.
Second
Applicant
In
their capacities as duly appointed final liquidators of
Senqu
Coal Trading (Pty) Ltd,
Registration
No: 2018/043976/07)
and
COMETA
TRADING (PTY) LTD
Respondent
(Application
seeking disposition in terms of s 341(2) of
the
1973 Companies Act)

Before: The Hon. Mr Acting Justice Montzinger
Heard: 17 March 2025
Judgment
delivered electronically: 17 March 2025

JUDGMENT

(LEAVE TO APPEAL)

Montzinger AJ

Summary Introduction

1. The respondent, Cometa Trading (Pty) Ltd, applies for leave to appeal against my judgment of 14 November 2024. In that judgment, I granted relief in favour of the applicants, the liquidators of Senqu Coal Trading (Pty) Ltd (“Senqu”), who approached the court seeking an order to recover a disposition of R710,763.92, paid to Cometa after the commencement of Senqu’s winding-up.
2. The application for leave to appeal was noted in time already on 5 December 2024. However, due to administrative hurdles and the temporary nature of my appointment, my tenure as an Acting Judge

having come to an end, I was not initially aware that Cometa had filed the application.

3. The application for leave to appeal is premised on section 16(1)(a)(i), read with section 17(1) and (6) of the Superior Courts Act[1]. Cometa’s basis for seeking leave is essentially that the appeal would have a reasonable prospect of success or that there are compelling circumstances justifying the granting of leave.
4. The application for leave is opposed.

The grounds relied on why leave should be granted

5. The application for leave to appeal suggests that, although I correctly identified the four requirements for granting relief in terms of section 341(2) of the 1973 Companies Act, I erred in concluding that the liquidators had established all these grounds.
6. Section 341(2) provides for the requirements for establishing a voidable disposition. The party claiming a disposition must show that (i) a disposition was made; (ii) by the company (iii) of property that belong to the company to be wound-up (iv) and that

the company was unable to pay its debts after the commencement of the winding-up.

7. The liquidators plainly met two of these requirements, as it was undisputed that (i) a disposition was made, and (ii) it occurred after the commencement of Senqu’s winding-up. Cometa takes issue with the remaining two requirements, and that is where it contends I committed errors.

8. First, it was argued, by Mr. Jonker on behalf of Cometa, that I never made a finding on whether the disposition was in fact made by Senqu, claiming my judgment dealt only with whether the funds belonged to Senqu. As in the main hearing, emphasis was placed on applying the Plascon-Evans rule to resolve factual disputes. I am criticised for not having applied the rule correctly; Cometa contends that, had I done so, I would have found that on its version (which I was bound to accept):

8.1 The transfer of funds on which the liquidators relied was effected by Cometa, not Senqu, because at the time Senqu had no control or management over the funds in the bank account.

8.2 When the funds were transferred, Ms. Lourie (who actually executed the payment via internet banking) did not do so as a duly authorised representative of Senqu, nor did Senqu’s Board of Directors authorise her to transfer the funds.

9. Second, regarding whether the funds (or property) belonged to Senqu, I apparently failed to consider that, on a Plascon-Evans approach to the facts, the legal relationship between Senqu and Cometa was such that Senqu, as the named account holder, merely held the account as Cometa’s agent. I am criticised for overlooking that Senqu was a dormant, non-trading entity with no interest or control over the deposits and withdrawals in the bank account, while Cometa, with Senqu’s knowledge, maintained full control over and operated the account with Senqu’s consent.

10. Reliance was placed on the judgment of McEwen, *NO v Hansa*[2] to argue that I should have recognised the agency relationship and by not doing so I allowed “the insolvent’s creditors to reap the benefit of that which was in truth never legally vested in the insolvent himself...”.

11. Third, Cometa says a compelling reason for granting leave exists because the matter raises an important question about what constitutes a disposition by “the company”, particularly where the company is dormant and has ceased trading.

12. Fourth, Cometa contends that another compelling reason for leave is whether, on these facts, Senqu was an agent of Cometa and whether that agency was terminated by insolvency. Cometa argues that this has an effect on whether the funds can be said to be Senqu’s “property” as contemplated by section 341(2) of the 1973

Companies Act.

13. I will briefly outline the requirements for granting leave to appeal before addressing each ground.

Requirements for leave to appeal to granted

14. The Superior Courts Act[3] and case law[4] from courts higher up in the decision making hierarchy requires me to assess, dispassionately and by reference to the facts and law, whether an appellate court could reasonably arrive at a different conclusion. Also, as articulated in Ramakatsa[5], Senqu as the party seeking leave to appeal must show, on proper grounds, a sound, rational basis for concluding that there is a reasonable rather than a remote chance of success on appeal. In my view this means that the merits of the case remain crucial to determine whether a realistic prospect of success exists. A bare or speculative contention of error is insufficient; the applicant must establish a credible premise for believing that another court could arrive at a different outcome.
15. Furthermore, an applicant can also seek leave on the basis that there are compelling reasons that justify leave being granted[6]. Compelling reasons include, among others, the involvement of substantial public interest, an important question of law, differing

judicial interpretations, or a discrete issue of statutory interpretation with implications for future cases[7]. However, where it is proposed that compelling reasons exist why leave should be granted, I am required to consider the compelling

reasons

also in conjunction with the merits of the appeal, which remain often decisive[8].

16. Therefore, a court considering an application for leave to appeal must first decide whether there is a sound, rational basis to conclude that another court would uphold the appeal. In considering whether compelling reasons exist that warrant appellate interference, the court may grant leave on that basis, but not without due regard
- to the merits.
17. In my reading of the application for leave to appeal I identified two grounds in support of the contention that an appeal would have good prospects of success and two further grounds why compelling circumstances justify that leave to appeal should be granted.

Ground 1: No finding whether the disposition was in fact made by Senqu

18. I am not persuaded that this ground warrants that leave be granted.
19. In the main judgment, I explained that I am bound by the legal position that funds in a company's bank account belong to that company. I addressed this under the heading "The status of money in a bank account," referring to the Whitehead[9] judgment. Later in the main judgment, when evaluating the facts and law, I found that it was undisputed that the R710,763.92 was held in a bank account registered to Senqu[10]. I also concluded that while Cometa might have treated the 706-account as its own, until the bank was notified of that arrangement, it owed its obligations regarding the funds to Senqu[11].

20. In paragraph 31 of the main judgment, I stated:

“Consequently, the legal position prevails: the funds in the 706-account belonged to Senqu. The fact that the transfer was executed by someone unauthorised to act on Senqu’s behalf does not alter this conclusion, as the law attaches no significance to such an action in determining ownership of the funds.”

21. Mr. Jonker, appearing on behalf of Cometa, impressed on me that I never actually found that Senqu itself made the disputed disposition. He pointed out that the person who executed the electronic transfer, Ms. Lourie, was a director of Cometa and did not act under Senqu’s authority when she moved the funds. However, this submission loses sight of the legal position I expounded on[12], in the main judgment, which is that once a company opens a bank account, the bank owes its obligations solely to that account holder, absent any special arrangement of which the bank is aware. If no agreement exists to the contrary (or if the bank is not notified of such an agreement), the account holder (in this case Senqu) is the only party entitled to direct the flow of funds. Consequently, Ms. Lourie’s conduct in transferring the money from Senqu’s account to Cometa necessarily constitutes a disposition by Senqu for the purposes of section 341(2) of the 1973 Companies Act, because the bank’s obligation was to Senqu alone. In law and on the facts it is therefore Senqu who made the payment, regardless of the fact Ms. Lourie in fact did so and regardless of her subjective intention.

Ground 2: Failure to consider that Senqu held the account in its name merely as an agent of Cometa

22. This ground also fails to gain traction.

23. It was never Cometa’s case that Senqu was acting or holding the bank account as Cometa’s agent. My review of Cometa’s answering papers, confirmatory affidavits, and written submissions reveals no mention of an agency arrangement. The term “agent” does not appear, nor does any indirect reference to it.

24. Cometa cannot raise this new point now in support of its application for leave to appeal, as it was not pleaded.

25. In any event, the agency argument fails on the merits. Having regard to the facts of this case, it does not change the established legal position that once money is deposited, it belongs to the bank, and

neither the account holder nor a third party can vary the bank’s obligation in the absence of prior notification. The bank was never informed of any agency arrangement. If the bank was aware of such agency arrangement Cometa could potentially have succeeded under the exception to the general rule that the bank only owes its obligations solely to the account holder.

Grounds 3 and 4: Special circumstances for leave to be granted

26. I am unpersuaded that this matter warrants leave on the basis that it presents important legal questions or considerations that only a higher court can decide.
27. What constitutes a “disposition” is already defined in the Insolvency Act.
28. The argument that a “dormant” company cannot effect a

disposition

does not, in my view, constitute a compelling reason for appellate scrutiny. Whether a company is dormant or active does not affect its legal personality or the requirements under section 341(2) of the 1973 Companies Act. As far as I am aware, South African law

makes no distinction between active and dormant companies; both remain juristic persons until deregistration.

29. In any event, in my view, the question of dormancy will ultimately always be factual to determine whether the company continued to exist and had the capacity to dispose of its property. It is not clear in

my mind what principle an appellate court will be asked to clarify or establish.

30. As for agency, it likewise does not qualify as a compelling basis for leave. I have already noted that agency was never pleaded. Even if it had been, Cometa has a substantive problem: the bank was never informed of any agency arrangement. In terms of the Joint Stock Company judgment and other authorities that dealt with the same central issue, Cometa would remain unable to show that the bank was aware of such an arrangement. Thus, even if Senqu had acted as Cometa’s agent, and even if an appellate court should find that in the circumstances like the present a dormant company may be regarded as an agent where its bank account is used as a ‘stash’

account by a third party, that would not entitle Cometa to the funds in the absence of the bank being aware of such an arrangement.

Conclusion

31. For the reasons stated Cometa has failed to demonstrate a sound, rational basis for concluding that another court would reasonably come to a different outcome. I am therefore not persuaded to grant leave and in the circumstances make the following order:

“The application for leave to appeal is dismissed with costs on a party and party scale, including the costs of counsel on scale B.”

A MONTZINGER

Acting Judge of the High Court

Appearances:

Applicant's counsel:

Mr. P S Bothma

Applicant's attorney:

Boshoff Bronn & Smit Inc

Respondent's counsel:

Mr. J W Jonker

Respondent's attorney:

Cliffe Dekker Hofmeyr Inc

[1] 10 of 2013

[2] 1968

(1) SA 465 (A) at 472A - B

[3] 10 of 2013

[4] Minister of Justice and Constitutional Development and Others v Southern Africa Litigation Centre and Others [2016] ZASCA 17; 2016

(3) SA 317 (SCA);

[5] Ramakatsa v African National Congress (Case no 724/2019) ("Ramakatsa")

[6] Section 17(1)(a) of the Superior Court Act

[7] Van Loggerenberg: Erasmus Superior Court Practice (3rd ed) Vol 1 D106-108

[8] Caratco (Pty) Ltd v Independent Advisory (Pty) Ltd 2020

(5) SA 35 (SCA) at para 2

[9] Trustees of the Insolvent Estate of Whitehead v Dumas and Another 2013

(3) SA 331 (SCA) ("Whitehead")

[10] Par 27 of main judgment

[11] Par 28 of main judgment

[12] Joint Stock Company Varvarinskoye v ABSA Bank Ltd and Others [2008] ZASCA 35; 2008 (4) SA 287 (SCA), and Van Wyk Van Heerden Attorneys v Gore N.O. and Another [2022] ZASCA 128

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