

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

Case number: 2083/2021

Reportable: YES/NO

Of Interest to other Judges: YES/NO

Circulate to Magistrates: YES/NO

In the matter between:

LOUIS JOSEPHUS JACOBUS OOSTHUIZEN

Applicant

And

HEEVER BOERDERY CC [IN LIQUIDATION]

First Respondent

NOLWAZI PRECIOUS ZULU N.O

Second Respondent

(in her capacity as duly appointed liquidator of
Heever Boerdery [in liquidation])

In the counter application between:

REENEN RANCH CC

Applicant

And

HEEVER BOERDERY CC [IN LIQUIDATION]

First Respondent

NOLWAZI PRECIOUS ZULU N.O.

Second Respondent

LOUIS JOSEPHUS JACOBUS OOSTHUIZEN

Third Respondent

COMPANIES AND INTELLECTUAL PROPERTY

Fourth Respondent

COMMISSION

HEARD ON: This application was determined on the basis of written arguments instead of an oral hearing.

JUDGMENT BY:

DANISO, J

DELIVERED ON: This judgment was handed down electronically by circulation to the parties' representatives by way of email and by release to SAFLII. The date and time for hand-down is deemed to be 09h00 on 06 June 2022.

[1] This is an opposed application for leave to appeal against my judgment and the consequent order delivered on 24 February 2022. The order followed upon:

1.1. the dismissal of the applicant's application to place the first respondent, Heever Boerdery CC under supervision and commencing business rescue proceedings and;

1.2. the intervening creditor, Reenen Ranch's counter application was upheld with the effect that the special resolution which initiated Heever Boerdery CC's voluntary liquidation was declared null and void and the consequent liquidation proceedings was set aside.

[2] Two grounds of appeal are raised in the notice of application for leave to appeal namely that, this court erred in disregarding the *Plascon-Evans* rule in finding that the special resolution adopted by the members of Heever Boerdery CC was not adopted properly thereby setting it aside including the liquidation proceedings and by concluding that there are no reasonable prospects for Heever Boerdery CC to be rescued. The applicant accordingly, contends that there is a reasonable possibility that the Supreme Court of Appeal or the Full Bench of this court would come to another decision.

[3] This application is, by consent between the parties determined on the basis of written heads of argument.

[4] The grounds of the application for leave to appeal as set out in paragraph 1 are largely incoherent. In paragraph 2 at 2.1. to 2.4. the applicant has essentially repeated the arguments proffered in support of his case in the main application which were addressed in the reasons for my judgment.

[5] The contention that there is a reasonable possibility that another court would come to a different decision essentially means that there are reasonable prospects of the appeal succeeding as contemplated in section 17(1)(a) of the Superior Courts Act 10 of 2013 in terms of which leave can only be granted where I'm certain that the appeal would have a reasonable prospect of success. See *Acting National Director of Public Prosecutions & others v Democratic Alliance* in *Re: Democratic Alliance v Acting National Director of Public Prosecutions & others* (19577/09) [2016] ZAGPPHC 489 (24 June 2016); [2016] JOL 36123 (GP).

[6] I'm not persuaded that there are reasonable prospects of succeeding with these grounds on appeal or that another court will come to a different conclusion. For the following reasons:

6.1. The judgment is attacked on the grounds that in paragraph 17 it is held that: "...*ex facie the documents, an impression is created that the deceased was present at the special meeting and voted in favour of a special resolution to be passed to place the CC in voluntary liquidation...*" whereas a full explanation as to the particular circumstances that led to the members signing on different dates is provided by way of affidavits and, despite the deceased's absence the meeting was properly quorate. Furthermore, the applicant's version as to how it came about that the deceased's signature appeared to be different in the special resolution raised a real, genuine and bona fide dispute of fact as Rheenen Ranch's forensic analyst did not consult the deceased's family members or caretakers to consider the circumstances under which the signature was appended therefore, the court should have applied the Plascon-Rule in that regard.

6.1.1. In my view, in paragraph 17 of the main judgment I have fully addressed the reasons for my finding pertaining to the nullity of the special resolution and the liquidation proceedings. I deem it unnecessary to repeat my reasons thereof for the purpose of this judgment.

6.1.2. As regards the authenticity of the deceased's signature on the applicant's own submission, the findings in this regard were not based on Rheenen Ranch's allegations that the deceased signature was a forgery.¹

6.1.3. The allegations that the special resolution was valid as the meeting was quorate despite the deceased's absence were never raised in the main application. Similarly, the applicant's affidavit did not raise any dispute of facts which would have required the application of the *Plascon-Evans* rule. It is trite that "a real, genuine and *bona fide* dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed." See *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another* [2008] ZASCA 6; 2008 (3) SA 371 (SCA) at para 13.

6.2. With regard to the dismissal of the application, according to the applicant the requirements of just and equitable and financially distressed are alternative provisions therefore, this court's finding that it would not be just and equitable for Heever Boerdery CC to be placed under business rescue where the court correctly found that Heever Boerdery CC was in financial distress is erroneous.

6.2.2 I disagree. It was not in dispute that Heever Boerdery was financially distressed as contemplated in s128(1)(f) (i) of the Act due to its inability to pay its debts as they became due within the immediately ensuing six months. The determination that a company is financially distressed on its own, does not entitle a company to be summarily placed under business rescue. The onus was on the applicant to establish the

¹ Paragraph 2.6. of the applicant's heads of argument.

facts as envisaged in s128 (1)(b) read with s131(4)(a)(ii) and satisfy the court that Heever Boerdery could be rescued in the sense that there is a reasonable prospect that business rescue will result in its rehabilitation to either facilitate its continued existence in the state of its insolvency, or provide a better deal for the stakeholders than what they would receive through liquidation² alternatively, that it would be just and equitable to do so for financial reasons. For the reasons that I alluded to in paragraphs 19 to 23, I was not persuaded that the requirements pertinent to the order sought by the applicant have been met.

6.2.3. Except to put right that in the judgment, paragraph 22 it is stated that “*if the funds do materialize as alleged...*” not “*if the funds do not materialize as alleged...*” It is also clearly recorded in the judgment that these views were alluded to by counsel for Rheenen Ranch and I found them to be correct.

6.2.4. As regards the rest of the grounds of appeal, I’m of the view that I have addressed the reasons for my conclusions in that regard in my main judgment.

[7] It is for the reasons above, that I’m not persuaded that the issues raised by the applicant in his grounds of appeal would have reasonable prospects of success. The application for leave to appeal stands to be dismissed.

[8] In the result the following order is made:

1. The application for leave to appeal to the Supreme Court of Appeal or the full bench of this division against my judgment granted on 24 February 2022 is dismissed with costs.

² *Oakdene Square Properties (Pty) Ltd v Farm Bothasfontein (Kyalami) (Pty) Ltd* (609/2012) [2013] ZASCA 68 (27 May 2013) para 22 to 26

NS DANISO, J

APPEARANCES:

Counsel on behalf of Applicant:

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Instructed by:

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Counsel on behalf of Respondents:

Adv. S. Grobler

Instructed by:

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