

**HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

CASE NO:22790/2021

(1) REPORTABLE: NO.
(2) OF INTEREST TO OTHER JUDGES: NO.
(3) REVISED.
DATE: 1 July 2021
SIGNATURE 

In the matter between:

PARADISE CREEK INVESTMENTS 34 (PTY) LTD

Applicant

and

MJEJANE FARM MANAGEMENT (PTY) LTD

First Respondent

THE MASTER OF HIGH COURT, PRETORIA

Second Respondent

THEODOR WILHELM VAN DER HEEVER N.O

Third Respondent

TSEPO CHARLES RAMPATLA N.O

Fourth Respondent

HENDRIK PETRUS JOUBERT

Fifth Respondent

WILLEM MARTIN JOUBERT

Sixth Respondent

P ZEELIE N.O

First Intervening Party/Seventh Respondent

KRUGERCORRIDOR CC

Second Intervening Party/Eighth Respondent

J U D G M E N T (Leave to appeal)

This matter has been heard virtually via Teams and otherwise disposed of in terms of the Directives of the Judge President of this Division. The judgment and order are accordingly published and distributed electronically.

DAVIS, J

[1] Introduction

On 28 May 2021 this court set aside the liquidation of Mjejane Farm Management (Pty) Ltd (MFM) on an urgent basis. The fifth and sixth respondents in that application (referred to in the judgment as “the Jouberts”) and the seventh respondent, a Mr Zeelie NO (in his capacity as described in the judgment), by way of two separate applications, seek leave to appeal that order.

[2] The application of the Jouberts

- 2.1 The finding by this court that the meeting and the resolution purportedly taken on behalf of the shareholder of MFM, Keysha Investments 187 (Pty) Ltd (Keysha), had been unlawful and taken in a clandestine fashion, was not attacked in the application for leave to appeal.
- 2.2 The consequences of the above, which amount to fraud and which tainted the liquidation proceedings, remain weighty considerations in evaluating the question of whether there is a reasonable prospect whether a court on appeal would set aside the liquidation proceedings or not.

2.3 The Jouberts raise four grounds in support of their application for leave to appeal:

- The non-joinder of Keysha;
- The wishes of the creditors;
- MFM's inability to pay its debts;
- The court's discretion was exercised "wrongly".

2.4 The issue of non-joinder is a highly technical one: although Keysha was not separately cited as a juristic person, the whole basis of the application was that only the two Jouberts, as two of the three directors, purported to take a decision on behalf of Keysha. Once this decision is found to be void, as it has, Keysha effectively falls out of the picture. This was the point made by the other director, Roux, who was the deponent to the founding papers. Neither he, nor the Jouberts, asserted the existence of any "direct or substantial" interest on behalf of Keysha, which would have precluded the granting of an order. The Joubert's assertion that the order was given "behind Keysha's back" when any knowledge of proceedings to be acquired by the juristic person, fell within the knowledge of the natural persons who represent it, namely Roux and the Jouberts, is facetious to such an extent that I find no reasonable prospect that this point would succeed on appeal.

2.5 The wishes of creditors not only include Zeelie NO, but also the applicant that of the eighth respondent (Kruger corridor CC). The fact that the claims of the trust represented by Zeelie might be the largest, is perhaps the best point but that does not mean that Zeelie's wishes should be determinative of the matter. The case is also to be distinguished from the case law

mentioned in the judgment where liquidation proceedings have progressed a long way and, after some liquidation and distribution steps, a company is “taken out of liquidation”. One can readily understand that the wishes of then as yet unpaid creditors, should count for a lot. In the present case, that is not the situation. There was not even yet a first meeting of creditors. Apart from the initial seizures of books and assets (in which Zeelie’s office participated on an as yet undisclosed basis), the liquidation process has not actually progressed. All that has happened, was that the Jouberts’ clandestine operations were reversed. The creditors were thereafter left in the same position as before and no better nor worse off. Zeelie’s wishes in this regard were into account when this court exercised its discretion.

2.6 The discretion is an unfettered one and it was not, and neither could it be alleged that it was exercised arbitrarily, capriciously or for any improper reason on an improper basis. Courts of appeal are generally reluctant to interfere with the exercise of an untainted discretion.

2.7 MFM’s financial distress was noted in the judgment but this was subject to a fact-specific fluid situation such as, in particular, the harvest which was “coming in” during the proceedings or which was imminently pending. This was another factor taken into account in deciding whether the court should leave the Jouberts’ fraud intact or not.

2.8 I do not find sufficient prospect that another court would on appeal place its imprimatur on the improperly obtained liquidation of MJM and allow it to continue.

[3] The application of Zeelie NO

3.1 Mr Zeelie raised much the same points as above.

3.2 In respect of the non-joinder of Keysha, the same argument as above applies.

3.3 In respect of Zeelie's wishes as a representative of a creditor, yes, these are substantial but they were not "discounted" as argued, they were only held not to be determinative. During the hearing of the main argument, Adv Egan, who appeared for Mr Zeelie, was asked what his client as creditor would do if the liquidation contrived by the Jouberts were to be set aside and Mr Zeelie's application for conversion of that liquidation pending in the Mpumalanga Division were to fall by the wayside? The answer was simply that Mr Zeelie would then probably launch a separate new application for winding-up. In my view, should he be advised to do so, that is then what should happen. Then the claims of the trust, disputed as some of them are, can be properly ventilated in an application untainted by fraud. I find no reasonable prospect of success that a court of appeal would find that a tainted process is to be preferred over an untainted process or that Mr Zeelie's wishes as a creditor should be acceded to if the former would then be the result thereof.

[4] In all the premises, I find no reasonable prospects of success on appeal to exist.

[5] Order

The applications for leave to appeal by the fifth, sixth and seventh respondents are refused, with costs.


N DAVIS
Judge of the High Court
Gauteng Division, Pretoria

Date of Hearing: 18 June 2021

Judgment delivered: 1 July 2021

APPEARANCES:

For the Applicant:	Adv. M.P van der Merwe SC
Attorney for Applicant:	Weavind & Weavind Attorneys, Pretoria
For the 3 rd & 4 th Respondents:	Adv. D Van den Bogert
Attorney for 3 rd & 4 th Respondents:	Murphy Kwape Marits Attorneys, Centurion c/o AJ Kempen Incorporated, Pretoria
For the 5 th & 6 th Respondents:	Adv. A.S.L. van Wyk
Attorney for 5 th & 6 th Respondents:	Macintosh Cross & Farquharson Attorneys, Pretoria
For the 7 th Respondent:	Adv. G Egan
Attorney for 7 th Respondent:	Du Toit-Smuts Attorneys, Mpumalanga c/o Vermaak Beeslaar Attorneys, Pretoria