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**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN**

CASE NO: 5794/2016

In the matter between:

JAMES KANIAH

Applicant

And

WPC LOGISTICS (JOBURG) CC (IN LIQUIDATION)

First Respondent

CHAVONNES BADENHORST ST CLAIR COOPER NO

Second Respondent

LUKE BERNARD SAFFY NO

Third Respondent

CHENG-MING CHAO

Fourth Respondent

DILNAWAAZ FIRFIREY

Fifth Respondent

THE MASTER OF THE HIGH COURT, DURBAN

Sixth Respondent

JUDGMENT IN THE APPLICATION FOR LEAVE TO APPEAL

HENRIQUES J:

[1] This is an application by the fourth and fifth respondents for leave to appeal to the full bench of this division against the whole of the judgment delivered on 13 December 2017. The grounds upon which the fourth and fifth respondents rely on are set out in paragraphs 1 to 4 of the application for leave to appeal. In essence the fourth and fifth respondents submit that I erred in granting the applicant the relief he sought, specifically in allowing him to pursue the action instituted by the second and third respondents in their capacity as liquidators against the fourth respondent, notwithstanding the fact that I found the second and third respondents acted bona fide and did not act in a way in which no reasonable liquidator would have acted.

Legal position

[2] Applications for leave to appeal are governed by ss 16 and 17 of the Superior Courts Act 10 of 2013. Section 17 reads as follows:

‘(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 on appeal does not fall within the ambit of section 16(2)(a); and
 (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.’

[3] Both the fourth and fifth respondents submit that there are reasonable prospects of success within the meaning of section 17(1)(a)(i) of the Superior Courts Act. What is meant by reasonable prospects of success has always been defined to mean there is a reasonable possibility another court might come to a different decision.¹

[4] However, with the enactment of s17 of the Superior Courts Act, the test has obtained statutory force. The test to be applied is to use the word ‘would’ in deciding whether to grant leave to appeal – in other words ‘would another court come to a different decision?’ In the unreported decision of *The Mont Chevaux Trust (IT 2012/28) v Tina Goosen & 18 others* LCC 14R/2014 dated 3 November 2014, the Land Claims Court held, albeit obiter, that the wording of the subsection raised the bar of the test that now has to be applied to an application for leave to appeal. In

¹ *Van Heerden v Cronwright & others* 1985 (2) SA 342 (T) at 343H.

Notshokovu v S (157/15) [2016] zasca 112 (7 September 2016) at para 2 it was held that an appellant faces a higher and stringent threshold in terms of the Act.

[5] In *Acting National Director of Public Prosecution & others v Democratic Alliance In Re: Democratic Alliance v Acting National Director of Public Prosecutions & others* (19577/09) [2016] ZAGPPHC 489 (24 June 2016), Ledwaba DJP writing for the full court considered the test as envisaged in s 17 of the Superior Courts Act. At para 25 of the judgment he dealt with the test set out in *The Mont Chevaux Trust* above where Bertelsmann J held the following:

'It is clear that the threshold for granting leave to appeal against the 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.'

[6] At the hearing of the matter Mr Combrinck who appeared for the fourth and fifth respondents, submitted that there existed a possibility that another court 'might' come to a different decision. However, given the test in deciding whether to grant leave to appeal, I must be satisfied that another court would come to a different decision.

[7] In essence the applicant instituted the application in terms of s 387(4) of the Companies Act 61 of 1973 (the Act) read with s 66 of the Close Corporations Act 69 of 1984. The section provides that a person aggrieved by any act or decision of a liquidator may apply to the court after notice and thereupon the court may make such order as it thinks just. The parties are ad idem that the applicant had locus standi to institute the application. The section empowers the court to make whatever order it thinks just. Such discretion is not restricted.

[8] Although this court found that the second and third respondents did not act mala fide or in circumstances in which no reasonable liquidator could have acted, in the exercise of the discretion afforded by s 387(4), I found it appropriate to allow the applicant to continue with the action. The reasons for doing so were dealt with in the judgment at para 28.

[9] At para 28 of the judgment I recorded that given the composition of the membership of the first respondent, the fourth and fifth respondents together with the

creditors would always have been in a position to vote against proceeding with the action instituted against the fourth respondent and his wife. In addition the only remedy available to the applicant would be to approach this court to direct it to make an order it thinks just. Although I found that the second and third respondents did not act unreasonably and acted bona fide, the only suitable remedy for the applicant would have been to allow him to proceed with the action provided a suitable indemnity for costs was provided.

[10] Mr Combrinck submitted that once the court had made the finding that the second and third respondents had not acted mala fide and not in a manner no reasonable liquidator would have acted, that was the end of the enquiry. I disagree. What must also be borne in mind is that the second and third respondents indicated that they acted in accordance with the decision taken at the meeting and could not act contrary to same. They, however, indicated to the applicant to invoke s 387(4) and institute an application. The second and third respondents had no difficulty with this relief.

[11] By denying the applicant his right to pursue the action and limit him to the grounds set out in the decisions referred to in *Fargro Ltd v Godfrey & others* [1986] 3 All ER 279 and *Re: Edennote Ltd Tottenham Hotspur PLC and others v Ryman and another* [1995] 2 BCLC 248 namely, in circumstances where the liquidators acted mala fide or unreasonably, or in circumstances in which no reasonable liquidator would have acted would in essence have denied the applicant or a person in his position any form of relief and access to justice.

[12] One cannot have regard to the test enunciated in *Fargro* and *Edennote* and limit the enquiry to those two grounds. Section 387 specifically recognises the interests of members. As the wording of subsec 4 appears to be wide, and the exercise of such discretion is not restricted, I am of the view that there are no reasonable prospects that another court would come to a different decision.

[13] I say this purely based on the particular facts of this matter. As to the exercise of a discretion and the reluctance of an appeal court to interfere with same,

I can only refer to the judgment of Cloete JA in *Naylor & another v Jansen* 2007 (1) SA 16 (SCA) para 14 wherein he stated the following:

'Where the law has given a Judge an unfettered discretion, it is not for this Court to lay down rules which, while purporting to guide the Judge, will have the effect only of fettering the discretion. If, therefore, there are factors which the trial Court, in the exercise of its discretion, can and legitimately does decide to take into account so as to reach a different result, a Court on appeal is not entitled to interfere – even although it may or even probably would have given a different order. The reason is that the discretion exercised by the Court's giving the order is not a "broad" discretion (or a "discretion in the wide sense" or a "discretion loosely so called") which obliges the Court of first instance to have regard to a number of features in coming to its conclusion, and where a Court of appeal is at liberty to decide the matter according to its own view of the merits and to substitute its decision for the decision of the Court below, simply because it considers its conclusion more appropriate. The discretion is a discretion in the strict or narrow sense (also called a "strong" or a "true" discretion). In such a case, the power to interfere on appeal is limited to cases in which it is found that the Court vested with the discretion did not exercise the discretion judicially, which can be done by showing that the Court of first instance exercised the power conferred on it capriciously or upon a wrong principle, or did not bring its unbiased judgment to bear on the question or did not act for substantial reasons. Put differently, an appeal Court will interfere with the exercise of such a discretion only where it is shown that

“... the lower court had not exercised its discretion judicially, or that it had been influenced by wrong principles or a misdirection on the facts, or that it had reached a decision which in the result could not reasonably have been made by a court properly directing itself to all the relevant facts and principles”.’ (Footnotes omitted.)

[14] At the hearing of the matter the further issue which arose is that of the costs order which I made in the matter. Mr Bingham who appeared for the applicant in the main application and Mr Van Rooyen who appeared for the second and third respondents (the liquidators) indicated that should the court not grant leave to appeal in respect of what they termed the merits, then the only remaining issue would be an appeal against costs. They indicated that they have agreed that the order I granted which was prepared and submitted by Mr Van Rooyen on behalf of the second and third respondents, is ambiguous and contained patent errors. Mr Bingham indicated that in terms of the provisions of Rule 42(1) of the Rules of Court, I can, mero motu in the light thereof, amend the order. The effect of the proposed amendment to the costs order would not prejudice the fourth and fifth respondents and would remove any cause of complaint.

Rule 42(1)

[15] The relevant portions of Rule 42(1) read as follows:

'The court may, in addition to any other powers it may have, *mero motu* or upon the application of any party affected, rescind or vary:

...

(b) an order or judgment in which there is an ambiguity, or a patent error or omission, but only to the extent of such ambiguity, error or omission;'

[16] Mr Combrinck opposed the relief and indicated that this court was *functus officio* and could not alter or correct the relevant portions of the cost order.

[17] It is a general well-established rule that once a court has pronounced a final judgment or order, it becomes *functus officio*. However, both the Constitutional Court and the Appellate Division have recognised a number of exceptions to the general rule which are specifically catered for in Rule 42(1)(b) being that of an ambiguity or patent error. The subrule applies and can be invoked by the court either *mero motu* or upon the application of any party affected by such order.

[18] In light thereof and the exceptions to the general rule, Mr Combrinck's submission cannot stand. Both Mr Van Rooyen and Mr Bingham have indicated that I ought to invoke the provisions of Rule 42(1)(b). This court can do so at their instance alternatively do so *mero motu*. I am satisfied that I can and in consequence thereof will correct the ambiguity and patent error in the cost orders to the extent suggested by Mr Bingham and Mr Van Rooyen at the hearing.

[19] In the result, the orders I issue are the following:

- (a) The application for leave to appeal is dismissed with costs.
- (b) Paragraph 4 of the orders issued in the judgment delivered on 13 December 2017 are varied and are amended to read as follows:

- [4] In relation to the orders in paragraphs 2 and 3 hereinbefore it is ordered that:
- [4.1] no orders as to costs in the pursuance of the action will influence or prejudice the position of the creditors of the first respondent in any way;
- [4.2] in the event that a costs order is granted against the liquidators and/or the first respondent in the course of the pursuance of the action by the applicant, the liquidators are hereby directed to levy a contribution in respect of such costs upon the applicant;
- [4.3] upon the levying of any such contribution, the applicant is directed to make immediate payment thereof and the liquidators are hereby authorised to set-off any such costs order against the contribution to be levied upon the applicant.

HENRIQUES J

Application heard on :	3 May 2018
Further documentation to Judge :	7 May 2018:
Judgment delivered on :	9 May 2018
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