THE REPUBLIC OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

31/01/2017.

Case no: 4766/16

REPORTABLE: **No**
✓ OF INTEREST TO OTHERS JUDGES: **No**
✓ REVISED
DATE. 31 January 2017
SIGNATURE

In the matter between:

GIDEON DANIEL VAN TONDER	**APPLICANT**
AND	
THE MASTER OF THE HIGH COURT, PRETORIA	**FIRST RESPONDENT**
P.W. ENGELBRECHT NO	**SECOND RESPONDENT**
KOBUS VAN DER WESTHUIZEN NO	**THIRD RESPONDENT**
LYNN WARRICKER NO	**FOURTH RESPONDENT**

DUST-A-SIDE (PTY) LTD **FIFTH RESPONDENT**

Delivered: 31 January 2017

JUDGMENT

MOLAHLEHI AJ

Introduction

[1] This is an application for leave to appeal against the judgment of this court dated 16 September 2016 in terms of which the decision of the first respondent to seize take control and oversee the insolvency procedure of Serendipity Support Services Second Co-Operative (Pty) Ltd, the fifth respondent was reviewed and set aside.

[2] The gravamen of the criticism of the decision of the judgment is that the court erred in its interpretation of section 337 of the Companies Act, 1973 in relation to its inclusion of the Co-operatives Act, 2005. The essence of the argument in this respect is that had the court properly interpreted the expression "any other body corporate," as applied in section 337 of the Companies Act, it would have found that section 337 includes co-operatives registered in terms of the Co-operatives Act, 2005. The court is also criticised for failing to appreciate the interpretation it adopted would lead to a lacuna as concerning the winding up of co-operatives registered in terms of the Co-0peratives Act.

[3] The other criticism against the decision of the court is that it failed to take into account that section 3 of old Companies Act has been repealed and could therefore not assist in the interpretation of section 337.

[4] The traditional test to apply when considering leave to appeal is that of determining whether there are reasonable prospects of success on appeal if leave to appeal was to be granted. An application for leave to appeal is now governed by the provisions of section 17 of the Superior Courts Act (the Act). Section 17(1) (a) of the Act reads as follows:

> "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."

[5] There is generally an agreement between the authorities that the test for leave to appeal introduced by section 17 of the Act has placed the standard much higher and is more stringent than the traditional test.

[6] It may well be correct, as Counsel for the applicant contended, that the court was wrong in reading the repealed section 3 of the Companies Act with section 337. The appeal is

against the order of the order of the court. The other reason for arriving at the conclusion that the Master did not have the power to take control of the winding-up of the fifth respondent was based on the fact that the 2005 Co-operative Act has no provision incorporating the liquidation procedure of the Companies Act. The *lacuna* created by the legislature in that Act is an issue that requires the attention of the legislature and not the court.

[7] Based on the above I am of the view that the appeal has no reasonable prospects of success. It is on the basis of section 17 of the Superior Courts Act, that the leave to appeal stands to fail. I see no reason why the costs should not follow the results.

Order

[8] In the premises the applicant's leave to appeal is refused with costs.

E Molahlehi

Judge of the High Court:

Gauteng Division Pretoria

Appearances:

For the Applicant: Schabort & Walker Attorneys