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

Case no: **D10954/2023**

In the matter between:

NEDBANK LIMITED **APPLICANT**

and

LOCOCO 3 (PROPRIETARY) LIMITED **RESPONDENT**
(Reg. No. 1999/006598/07)

Coram: Mossop J

Heard: 18 June 2024

Delivered: 19 June 2024

ORDER

The following order is granted:

1. The application for leave to appeal the decision delivered on 22 May 2024 in which the respondent's application for discovery was refused is dismissed with costs, such to include the costs of two counsel on scale C.

2. An identical order is granted in the matters with the following case numbers:

2.1 D10914/2023;

2.2 D10955/2023;

2.3 D10956/2023;

2.4 D10957/2023;

2.5 D10958/2023;

2.6 D10959/2023;

2.7 D10960/2023;

2.8 D11378/2023; and

2.9 D11379/2023.

JUDGMENT

MOSSOP J:

Introduction

[1] This is an opposed application for leave to appeal against a decision handed down by me on 22 May 2024, when I dismissed an application brought by the respondent in which it sought an order that the applicant be directed to make discovery in terms of the provisions of Uniform rule 35(13) (the discovery application). The discovery application had been brought as a consequence of the applicant bringing an application to wind up the respondent on the grounds that it is commercially insolvent.

[2] I shall refer to the parties in this judgment as they are referred to in the winding up application, notwithstanding that it is the respondent who is the applicant in this application for leave to appeal.

[3] I am indebted to all counsel for their respective submissions, which have been of considerable assistance to me. This judgment has been prepared overnight and in some haste and it will suffer from some imperfections. In particular, it may not have the depth or comprehensiveness that I would want it to have. For that I apologise in advance, but I deemed it necessary to deliver the judgment as swiftly as possible in the hope that it may then be possible to constructively utilise the remaining time allocated for this matter and the other matters which are enrolled.

[4] The other matters to which I refer are nine other liquidation applications brought at the instance of the applicant in which nine companies that comprise the Leo Chetty Group of companies are sought to be liquidated, in addition to the liquidation of the respondent in this application. A discovery application was brought by the respondent in each of those liquidation applications, but for convenience's sake, only one application was argued and it was agreed that whatever order was forthcoming would apply to the other nine applications for discovery. The same will apply with this judgment: it will apply to the other applications for leave to appeal in the nine remaining liquidation applications.

The grounds of appeal

[5] The respondent has delivered a lengthy notice of application for leave to appeal. Over the span of some 17 pages holding some 70 paragraphs, it suggests that I erred in a number of fundamental ways in coming to the decision that I arrived at.

[6] Mr Rood SC, who appears for the applicant together with Ms Mtati and Mr Bester, delivered comprehensive heads of argument in which they identified two questions that cast a shadow over this application and then classified the seven grounds upon which I am alleged to have erred. The two questions framed are:

(a) Is my decision appealable? and

(b) If it is appealable, has the threshold imposed by s 17 of the Superior Courts Act 10 of 2013 (the Act) been met?

I find it convenient to follow Mr Rood's method of classification. I shall, however, first consider the first question, then deal with the grounds of the appeal and then deal with the second question.

Is the decision appealable?

[7] Mr Harpur SC, who appears for the respondent together with Mr Gevers, submitted that the decision is appealable while Mr Rood contended that it is not. There is no dispute that the discovery application is interlocutory in its nature.

[8] In general, interlocutory orders are not appealable. The *locus classicus* on the topic of appealability is *Zweni v Minister of Law and Order*,[1] where the Appellate Division ruled against the appealability of an interim order made by the court of first instance. It tested the interim order against (i) the finality of the order; (ii) the definitive rights of the parties; and (iii) the effect of disposing of a substantial portion of the relief claimed. The court also clarified what is meant by 'final effect', namely that it is not susceptible to alteration by the court of first instance. It appears that the approach advocated in *Zweni* has been gradually modified because in *Philani-Ma-Afrika v Mailula*,[2] the Supreme Court of Appeal held that the interests of justice was paramount in deciding whether orders were appealable, with each case being considered upon its own facts. The development of the law in this direction is further demonstrated in *National Treasury v Opposition to Urban Tolling*,[3] where the Constitutional Court stated that whether leave to appeal will be granted in respect of interim orders is based upon the interests of justice, requiring a weighing of

[1] *Zweni v Minister of Law and Order* 1993 (1) SA 523 (A).
[2] *Philani-Ma-Afrika v Mailula* 2010 (2) SA 573 (SCA) at para 20; See also *S v Western Areas* 2005 (5) SA 214 (SCA) at paras 25 and 26; *Khumalo v Holomisa* [2002] ZACC 12; 2002 (5) SA 401 (CC) para 8.
[3] *National Treasury v Opposition to Urban Tolling* 2012 (6) SA 223 (CC).

circumstances, including whether the interim order has a final effect. In *Tshwane City v Afriforum*,[4] the Constitutional Court stated that:

'Unlike before, appealability no longer depends largely on whether the interim order appealed against has final effect or is dispositive of a substantial portion of the relief claimed in the main application. All this is now subsumed under the constitutional interests of justice standard. The over-arching role of interests of justice considerations has relativised the final effect of the order or the disposition of the substantial portion of what is pending before the review court, in determining appealability […] If appealability or the grant of leave to appeal would best serve the interests of justice, then the appeal should be proceeded with no matter what the pre-Constitution common law impediments might suggest. . .'

[9] However, Mr Rood drew my attention to *TWK Agriculture Holdings (Pty) Ltd v Hoogveld Boerderybeleggings (Pty) Ltd and others*,[5] where Unterhalter AJA dealt with the appealability of an exception. He found that the law had to be ascertainable and had to meet reasonable standards of certainty. He reasoned further that courts should not adopt standards that are so porous that litigants have no idea what decision a court is likely to make. He stressed the importance of the doctrine of finality which would bring an end to the piecemeal hearing of appeals, observing that:

'As a general principle, the High Court should bring finality to the matter before it, in the sense laid down in Zweni. Only then should the matter be capable of being appealed to this court. It allows for the orderly use of the capacity of this court to hear appeals that warrant its attention. It prevents piecemeal appeals that are often costly and delay the resolution of matters before the High Court. It reinforces the duty of the High Court to bring matters to an expeditious, and final, conclusion. And it provides criteria so that litigants can determine, with tolerable certainty, whether a matter is appealable. These are the hallmarks of what the rule of law requires.'[6]

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[4] *Tshwane City v Afriforum* 2016 (2) SA 279 (CC).
[5] *TWK Agriculture Holdings (Pty) Ltd v Hoogveld Boerderybeleggings (Pty) Ltd and others* [2023] ZASCA 63.
[6] Infra para 21.

[10] Unterhalter AJA consequently found that the principles enunciated in *Zweni* had not been supplanted by the apparent change in jurisprudence and stated that:

'Recent decisions of this court that may have been tempted into the general orbit of the interests of justice should now be approached with the gravitational pull of Zweni.'[7]

Thus, the principles espoused in *Zweni* remain applicable. Mr Rood submitted that the decision in respect of which leave to appeal is sought lacked any of the attributes contemplated in *Zweni*.

[11] In support of his contrary position, Mr Harpur drew my attention to the matter of *Santam Ltd and others v Segal*,[8] a decision of the full bench of this Division. That matter held that on the facts specific to it, the dismissal of an application for further and better discovery was appealable. But there are several distinctions to be drawn between that matter and this matter:

(a) Firstly, the application in *Santam* arose out of an action and not an application, as in this matter. Discovery in action proceedings is permitted whereas in application proceedings the default position is that it does not occur unless the court so orders.

(b) Secondly, the claim in *Santam* was premised upon a contract of insurance and did not involve the solvency of a juristic entity, as in this matter. In my view, this latter factor is of some significance, for several reasons. Liquidation proceedings are inherently urgent.[9] They do not, or ought not to, move at the ordinary pace that actions do, or even as other types of applications do. Liquidation applications are intended to be considered and finalised swiftly because they may involve an entity trading in insolvent circumstances to the prejudice of the general body of its creditors and unknowing members of the public. Liquidation proceedings, furthermore, are sui

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[7] Infra para 30.
[8] *Santam Ltd and others v Segal* 2010 (2) SA 160 (N).
[9] *Van Greunen v Sigma Switchboard Manufacturing CC* [2003] ZAECHC 12; *Fourie and Another v Housezero Construction Pty (Ltd)* 2022 (JDR) 0102 (GP); *Ex Parte Nell NO and others* 2014 (6) SA 545 (GP).

generis in their nature. For example, they have a prescribed form in which they must be brought. They have their own requirements, such as security for the liquidator's costs, and they have a form of intervention which is unique in its practice and differs from conventional intervention.[10] Liquidation applications possess unique characteristics and operate within a distinct legal framework.[11] That framework is statutorily defined. It seems to me unlikely that the Legislature contemplated that discovery and appeals against a refusal to order discovery would occur in liquidation proceedings. If it was contemplated, allowance therefore should be found in the governing legislation. But it is not.

(c) Thirdly, the defendant in *Santam* did not deny having the documents that were sought. That is not the case in this matter, where the applicant has denied under oath that there are any documents of the kind sought by the respondent. I do not accept Mr Harpur's argument that there is a difference in denying the existence of documents in an affidavit which deals, inter alia, with the issue of discovery and denying their existence in an affidavit filed in response to a challenge to produce documents under Uniform rule 35. Under oath, the deponent to the applicant's affidavit has stated that the documents do not exist.

[12] In my view, *Santam* is distinguishable from the facts of this matter. After consideration of the competing versions, I conclude that the decision is not appealable for want of any of the attributes identified in *Zweni*. It would, furthermore, not be in the interests of justice to permit this matter to stall while an appeal is pursued. To grant the application would be to permit a piecemeal approach to appeals and an undesirable delay in the liquidation application, both being factors specifically identified and frowned upon by Unterhalter AJA in *TWK Agriculture*. That then is the end of the application for leave to appeal.

[13] In the event I am incorrect in that conclusion, I now briefly consider the other grounds advanced by the respondent, as categorized by Mr Rood in the applicant's heads of argument.

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[10] *Fullard v Fullard* 1979 (1) SA 368 (T) at 371F-372E.
[11] *Botes and Others v Tariomix (Pty) Ltd t/a Forever Diamonds and Gold and Others* [2024] ZANWHC 106; [2024] 2 All SA 830 (NWM) para 49.

The access to court ground

[14] Section 34 of the Constitution reads as follows:

'Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.'

This right is intended to guarantee the protection of the judicial process to persons who have disputes that are capable of being resolved by the courts. In *Chief Lesapo v North West Agricultural Bank and another*,[12] the Constitutional Court stated the following:

'[t]he right of access to court is indeed foundational to the stability of an orderly society. It ensures the peaceful, regulated and institutionalised mechanisms to resolve disputes, without resorting to self-help. The right of access to court is a bulwark against vigilantism, and the chaos and anarchy which it causes. Construed in this context of the rule of law and the principle against self-help in particular, access to court is indeed of cardinal importance. As a result, very powerful considerations would be required for its limitation to be reasonable and justifiable.'[13]

I am simply not able to discern how the right encapsulated in s 34 of the Constitution is affected by my decision.

The interests of justice ground

[15] This has largely been considered, and dealt with, when discussing the first question.

The exceptional circumstances ground

[16] This was one of the focal points of my decision and I dealt with the issue extensively. In his heads of argument, Mr Rood drew my attention to the recent

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[12] *Chief Lesapo v North West Agricultural Bank and another* [1999] ZACC 16; 2000 (1) SA 409 (CC) para 13.
[13] Infra para 22.

judgment in *Regents of the University of California and others v Eurolab (Pty) Ltd and others.*[14] That matter is a decision of the court of the Commissioner of Patents and involved, inter alia, a consideration of whether discovery should be ordered in terms of Uniform rule 35(13). In the course of its judgment, the court remarked as follows:

'Adv Franklin SC on behalf of Eurolab argued that the state of the litigation between the parties and the fact that Eurolab might not be able to obtain discovery of the notebooks in question in the revocation application, constitute sufficient "exceptional circumstances". I disagree. In the circumstances where Eurolab had been able to file evidence in its revocation application wherein it claims final relief, I find no exceptional circumstances meriting discovery in the present matter where interim relief is claimed. I also do not find the alleged need for the discovery of secondary evidence, which is largely if not totally irrelevant to the question of obviousness, to constitute such a possible prejudice to Eurolab, should it not be ordered, that it would constitute exceptional circumstances.'

This serves to further entrench the concept of 'exceptional circumstances'. I found none to be present when considering the discovery application. I remain unpersuaded that any exist.

The denial of documents ground

[17] I have largely dealt with this aspect earlier in this judgment. The deponent to the applicant's founding affidavit stated under oath that no documents as called for by the respondent exists. They did not exist because no such documents were submitted to the applicant's credit committee nor was there any such meeting of that committee.

[18] In *Makate v Vodacom (Pty) Ltd*,[15] Spilg J said the following:

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[14] *Regents of the University of California and others v Eurolab (Pty) Ltd* Case No. 039643/2024 (Court of the Commissioner of Patents) 31 May 2024, para 33.
[15] *Makate v Vodacom (Pty) Ltd* 2014 (1) SA 191 (GSJ) para 16.

‘The contents of a discovery affidavit are regarded prima facie to be conclusive with regard to the existence of documents and accordingly a court will be reluctant to go behind the affidavit. See *Swissborough Diamond Mines (Pty) Ltd and Others v Government of the Republic of South Africa and Others*. The courts require a sufficient degree of certainty that the documents exist (see *Continental Ore Construction v Highveld Steel & Vanadium Corporation*; and *Federal Wine and Brandy Co Ltd v Kantor* ('a degree of conviction approaching practical certainty'). This is hardly surprising. The consequence of a court order being de facto impossible to implement exposes the offending party to contempt proceedings for not procuring something he did not have in the first place, and exposes the order to ridicule. Accordingly it is necessary to be circumspect before directing production in the face of a denial of a document's existence.’ (Citations omitted)

[19] As previously pointed out, I can conceive of no difference between a discovery affidavit and any other affidavit where the existence of a document or documents is considered. I am unwilling to go behind the denial under oath that relevant documents exist.

The non-variation ground

[20] This issue enjoyed considerable space in the decision in respect of which leave to appeal is sought. The non-variation clause, which I referred to as the Shifren clause, in the loan agreements prohibits an oral variation of the agreement. The issue of such clauses was considered in *Brisley v Drotsky*,[16] where Cameron JA held as follows in his judgment in support of the joint judgment:

‘The *Shifren* decision represented a doctrinal and policy choice which, on balance, was sound. Apart from the fact of precedent and weighty considerations of commercial reliance and social certainty, that choice in itself remains sound four decades later. Constitutional considerations of equality do not detract from it. On the contrary, they seem to me to enhance it. As the joint judgment observes (para 7), it is fallacious to suggest that insistence on only written alterations to a

[16] *Brisley v Drotsky* 2002 (4) SA 1 (SCA) para 3.

contractual regimen necessarily protects the strong at the expense of the weak. In many situations the reverse is likely to be true.'

[21] The presence of this clause in the loan agreements is not in my view contrary to public policy. Nor is there any evidence of a fraud being perpetrated by the applicant. I do not foresee any other court coming to a different conclusion.

The discovery standard ground

[22] It is argued in this ground that I erred in stating that I ruled out the 'likelihood' of discovery advancing a defence to the respondent: I apparently ought to have considered the possibility, and not the likelihood, of discovery revealing such a defence.

[23] In my view, nothing turns on this. Relevance is a material consideration when issues of discovery are considered. In any event, the deponent on behalf of the applicant has stated that the documents sought by the respondent do not exist. I cannot order the production of that which does not exist and there is no basis for me to question the assertion of the deponent.

The ambit of proceedings ground

[24] The filter that has been put in place when it comes to discovery in application proceedings is the presence of exceptional circumstances. There is a distinction between actions and application proceedings. In the view that I take of the matter, that distinction must not be blurred by allowing discovery in application proceedings to occur in the absence of exceptional circumstances, for if that were to occur, then discovery would be demanded in every application and the benefits of application proceedings would be lost.

[25] I turn now, finally, to consider the second question formulated by Mr Rood.

Assuming appealability is found to exist, has the threshold contemplated in s 17 of the Act been met?

[26] Section 17(1) of the Act 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.'

[27] Prior to the enactment of the Act, the applicable test in an application for leave to appeal was whether there were reasonable prospects that an appeal court may come to a different conclusion than that arrived at by the lower court. The enactment of the Act has changed that test and has significantly raised the threshold for the granting of leave to appeal.[17] The use of the word 'would' in the Act indicates that there must be a measure of certainty that another court will differ from the court whose judgment is sought to be appealed against. An applicant for leave to appeal thus faces a higher threshold[18] under the provisions of the Act than under the repealed Supreme Court Act 59 of 1959. In *Ramakatsa and Others v African National Congress and Another*,[19] the Supreme Court of Appeal formulated the approach that should be taken as follows:

'The test of reasonable prospects of success postulates a dispassionate decision based on the facts and the law that a court of appeal could reasonably arrive at a conclusion different to that of the trial court. In other words, the appellants in this

[17] *Public Protector of South Africa v Speaker of the National Assembly and Others* [2022] ZAWCHC 222 para 14.
[18] *Notshokovu v S* [2016] ZASCA 112 para 2.
[19] *Ramakatsa and Others v African National Congress and Another* [2021] ZASCA 31 para 10.

matter need to convince this Court on proper grounds that they have prospects of success on appeal. Those prospects of success must not be remote, but there must exist a reasonable chance of succeeding. A sound rational basis for the conclusion that there are prospects of success must be shown to exist'.

[28] Leave to appeal ought therefore only to be granted where a court is of the opinion that the appeal would have a reasonable prospect of success, and which prospects are not too remote.[20] As was stated by Schippers JA in *MEC for Health, Eastern Cape v Mkhitha and Another*[21]:

'A mere possibility of success, an arguable case or one that is not hopeless, is not enough. There must be a sound, rational basis to conclude that there is a reasonable prospect of success on appeal.'

[29] Given the fact that discovery is only ordered in exceptional circumstances, it follows that it is not routinely ordered for exceptional circumstances cannot be present in every matter otherwise they would, by definition, not be exceptional but would be routine. I have listened to the competing arguments of counsel, and I have had regard to the authorities to which I was directed by counsel. I deemed it prudent to briefly reserve judgment overnight to give me the opportunity to fully consider those submissions and to assess their significance. I am of the considered view that an application for leave to appeal would not have a reasonable prospect of success and I find there to be no other compelling reason why leave to appeal should be granted.

Order

[30] I accordingly make the following order:

1. The application for leave to appeal the decision delivered on 22 May 2024 in which the respondent's application for discovery was refused is dismissed with costs, such to include the costs of two counsel on scale C.

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[20] Infra para 10.
[21] *MEC for Health, Eastern Cape v Mkhitha and Another* [2016] ZASCA 176 para 17.

2. An identical order is granted in the matters with the following case numbers:

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2.8 D11378/2023; and

2.9 D11379/2023.

MOSSOP J

APPEARANCES

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