REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case Number: 004697/2024

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: ~~NO~~ Yes

11/2/25 [redacted]
DATE SIGNATURE

In the matter between:

WYNAND DORFLING N. O	First Applicant
JAYNE DORFLING N. O	Second Applicant
and	
JOHAN FRANCOIS ENGELBRECHT N. O	First Respondent
AMANDA LINDOKUHLE VILAKAZI N. O	Second Respondent
NEDBANK LIMITED	Third Respondent
MASTER OF THE HIGH COURT, JOHANNESBURG	Fourth Respondent

Delivered: *This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the parties/their legal representatives by e-mail and by uploading it to the electronic file of this matter on Caselines. The date for hand-down is deemed to be 12 February 2025.*

Summary: Application for leave to appeal. The requirements of section 17(1) of the Superior Courts Act not met. The Court had exercised discretion when refusing leave to institute an action for damages in the name of the close corporation under liquidation. A Court of appeal loath to interfere with exercise of discretion. Held: (1) The application for leave to appeal is refused. Held: (2) The applicants must pay the costs of this application on party and party scale taxable at scale B.

JUDGMENT-LEAVE TO APPEAL

MOSHOANA, J

Introduction

[1] Before me is an opposed application for leave to appeal the judgment of this Court handed down on 7 November 2024, in terms of which an application for leave to institute a claim for damages on behalf of a liquidated close corporation was dismissed with costs. After hearing submissions, this Court retired in order to consider all the submissions made.

Evaluation

[2] When faced with an application of this nature, a Court must have regard to the provisions of section 17(1) of the Superior Courts Act[1]. In terms of the section leave to appeal ought to be granted in the circumstances where an opinion is held that another Court would arrive at a different conclusion. The applicant before me did not suggest that compelling reasons exist for an appeal to be heard.

[3] The applicant has raised a plethora of grounds upon which the present application is predicated. In the main, the applicant contended that this Court failed to pronounce itself on the specific relief to institute an action against the liquidators for their own negligence or breach of the duty of care.

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[1] Act 10 of 2013 as amended.

[4] Although the applicant submits that this Court did not expressly deal with the contemplated action against the liquidators, the application was concerned with leave to institute an action. Even if this Court, as it is now contended, confined itself to the action against Nedbank, the same reasons advance by the Court in refusing leave to institute an action against the Nedbank applies *mutatis mutandis* against an action contemplated against the liquidators. Nevertheless, of significance, an appeal lies against an order of a Court as opposed to the reasons. As said, the application before this Court involved leave to institute an action on behalf of a liquidated close corporation. Such an application was dismissed by the Court. This dismissal simply means that this Court refused to exercise its discretion to allow institution of an action on behalf of a liquidated entity.

[5] A Court of appeal is loath to interfere with an exercise of discretion unless it is demonstrated that wrong principles of law were applied. More recently, the Supreme Court of Appeal in *Du Plessis v Majiedt NO and Others*[2], confirmed that once liquidation or sequestration happens, the liquidated and or sequestrated is divested of the estate including the legal standing to institute proceedings. Similarly, in *casu* the power to institute proceedings remained with the liquidators.

[6] With regard to instituting an action against a liquidator, a claimant does not necessarily require leave to do so. The section 379(2) procedure remains available to be used[3]. This Court in its judgment stated that to be the legal position. The fact that the sale had happened already does not, contrary to the argument by Mr Pretorius for the applicant, deprive a claimant to sue for negligence or for breach of duty of care[4]. The liquidators stands in a fiduciary duty and open to be sued by any creditor or company should he or she fail in his or her fiduciary duties[5]

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2 (841/2023) [2025] ZASCA 4 (28 January 2025)

3 See *Standard Bank v The Master of the High Court* (103/09) 2010 ZASCA 4 (19 February 2010) (*Standard Bank*).

4 Ponnan JA in *Standard Bank* stated the following: "In that event the liquidators' removal from office, with the consequence that those who succeed them may in due course consider afresh a fairly substantial claim in the estate in liquidation, in of itself, puts paid to the notion that their removal would amount to a *brutum fulmen*… *It would be unpalatable to countenance the notion that liquidators who have made themselves guilty of serious misconduct should not be removed from office simply because it is late in the liquidation process.*

5 *Ex Parte Clifford Homes Construction (Pty) Ltd* 1989 (4) SA 610 (W) and *Commentary on the Companies Act*, Blackman and others Vol 3, quoted with approval in *Standard Bank* para 97.

[7] For all the above reasons, I make the following order:

Order

1. The application for leave to appeal is dismissed.
2. The applicant is to pay the costs of this application on a party and party scale taxable or to be settled at scale B.

[redacted]

GN MOSHOANA
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

APPEARANCES:

For the Applicant:	Mr JJ Pretorius
Instructed by:	Muller Attorneys, Pretoria
For the Respondent:	Mr JM Killian
Instructed by:	Gerrit Coetzee Attorneys, Pretoria
Date of the hearing:	11 February 2025
Date of judgment:	12 February 2025