

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO. 2022/54688

(1)	REPORTABLE: NO/ YES
(2)	OF INTEREST TO OTHER JUDGES: NO/ YES
(3)	REVISED: NO /YES
DATE	13/02/2025
SIGNATURE	[Redacted Signature]

In the matter between:

DINEAM TRADE (PTY) LTD

Applicant

And

SUMALI INVESTMENTS 101 (PTY) LTD

Respondent

This Judgment is deemed to have been handed down electronically by circulation to the parties' representatives via email and uploaded onto the caselines system 13 February 2025

Judgment- Leave to Appeal

Thupaatlase AJ

Introduction

[1] This an application for leave to appeal against my judgment in dismissing an application for the provisional liquidation of the respondent . The judgment against which leave to appeal is sought is detailed enough and I do not intend to rehash my reasoning and findings.

[2] In my judgment I found that the applicant failed to establish that the respondent was unable to pay its debts and therefore insolvent as contemplated in terms of sections 345 (1) (a) read with section 344 (f) of the Companies Act 61 of 1973 (old Act) read together with item 9 of Schedule 5 of the Companies Act, 71 of 2008, (alternatively in terms of section 81 (1) (c) (ii) of the Companies 71 of 2008 (the New Act).

[3] The basis of such indebtedness was an alleged failure by the respondent to refund the applicant the full purchase and interest thereon. The refund was demanded after the respondent had allegedly failed to effect transfer of a property to the applicant and to develop sectional title units. There were also allegations of fraud against the respondent.

[4] It is common cause that the parties entered into a written agreement for the purchase of a unit in a proposed sectional title scheme. It is also common cause that at the time of the hearing the property had not being transferred as contemplated in the written sale agreement concluded by the parties.

[5] The purchase price was a sum R 2 299 360.00 excluding value added tax (VAT) and with inclusion of 14% VAT the purchase price totalled the sum of R 2 621 270.40. The purchase price was to be paid into three tranches. The timelines for the payment of these tranches were stipulated in the written sale agreement.

[6] The applicant duly fulfilled its obligations by paying the purchase price as agreed and in accordance with the envisaged timelines. The estimated date for the occupation was 31 December 2012. This was contingent upon respondent having consulted with its architect to sanction such occupation.

[7] It was specifically recorded that the date was only an estimation, and the seller would not be held to this date should there be a delay caused by factors out of the seller's control.

[8] Notwithstanding that the applicant made payments as agreed, it is alleged that the respondent has to date failed or refused and/or neglected to effect transfer of the property into the name of the applicant. The respondent has provided various reasons for the delay or failure to effect such a transfer. Among the reasons is that there were difficulties experienced in opening sectional title register.

[9] After argument, I concluded that the applicant has failed to show that it is entitled to the relief being sought and dismissed the application. In the main I concluded that the alleged sale by the respondent was not a fraudulent transaction. I concluded that

inability of the respondent to transfer ownership to the applicant didn't constitute fraud.

[10] I specifically relied in the dictum in *Koster v Norval* (20609/14) [2015] ZASCA 185 (30 November 2015) at para 4 to the effect that: 'It is trite that it is not a requirement for a valid contract of sale that the seller must be the owner of the thing sold'. The SCA quoted with approval *Alpha Trust (Edms) Bpk v Van Der Walt* 1975 (3) SA 734 (A) at 743H-744A.

[11] In respect of whether indebtedness was proved in order to trigger the provisions of sections 345 (1) (a) read with section 344 (f) of the Companies Act 61 of 1973 (old Act) read together with item 9 of Schedule 5 of the Companies Act, 71 of 2008, (alternatively in terms of section 81 (1) (c) (ii) of the Companies 71 of 2008 (the Act). I concluded that based on the factual matrix which I found to be in support of the version of the respondent. This was that the respondent had provided sufficient security of the alleged debt and further that that for a period of ten years, the applicant had collected rental from the shop it rented out (Shop C5 Stellar Wholesale City).

[12] I was satisfied that the respondent disputed indebtedness to the applicant on bona fide and reasonable grounds as envisaged in the case of *Commonwealth Shippers Ltd v Mayladn Properties (Pty) Ltd (United Dress Fabrics (Pty) and Another Intervening* 1978 (1) SA 70 (D) at 72D and also In *Helderberg Laboratories CC v Solar Technologies (Pty) Ltd* 2008 (2) SA 627 (C).

[13] I was also mindful of the caution which was sounded *Badenhorst v Northern Construction Enterprises (Pty) Ltd* 1956 (2) SA 346 (T) that an application for the liquidation of a company should not be resorted to enforce the payment of a debt which is bona fide disputed by the company. The liquidation of a company affects interests of all creditors and shareholders, and an order for its liquidation should not be granted lightly on the application of a single creditor.

Grounds of Appeal

[14] The grounds of appeal are set out in notice file by the applicant. The application is opposed by the respondent. The applicants sought leave to appeal both in terms section 17(1) (a) (i) and section 17(1) (a) (ii) of the Superior Courts Act 10 of 2013 on

the basis that the appeal would have a reasonable prospect of success and that there are compelling reasons why an appeal should be heard.

[15] The applicant tabulated the grounds where it is alleged, I erred as follows:

1. the Respondent was not deemed insolvent and not persuaded that the Respondent is unable to pay its debts as contemplated in section 344(f) of the Act; and
2. the security tendered by the respondent was adequate and sufficient security, notwithstanding the deemed insolvency and that it would be retained in the trust account of the respondent's erstwhile attorney of record pending finalisation of any legal proceedings to be instituted by the applicant was sufficient for purposes of demonstrating commercial solvency.

The Law

[16] The approach that should guide this court in arriving at a decision whether to grant leave to appeal or not was stated succinctly in *Mount Chevaux Trust v Tina Goosen & Others* 2014 JDR 2325 LCC at para [6] that 'it is clear that the threshold for granting leave to appeal against 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 may come to a different conclusion. See *Van Heerden v Cronwright and 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'.

[17] There is a clear recognition of the heightened threshold in cases of application for leave in terms of the new statutory regime. In *Dexgroup (Pty) Ltd v Trusco Group Intl (Pty) Ltd* 2013 (6) SA 520 (SCA) at para [24] the court held that: 'The need to obtain leave to appeal is a valuable tool in ensuring that scarce judicial resources are not spent on appeals that lack merit. It should in this case be deployed by refusing leave to appeal'.

[18] In the case of *Ramakatsa and Others v African National Congress and Another* [2021] ZASCA 31 (31 March 2021) the SCA gave an imprimatur to that position by stating that: 'Turning the focus to the relevant provisions of the Superior Courts Act (the SC Act), leave to appeal may only be granted where judges concerned are of the opinion that the appeal would have a reasonable prospect of success or there are compelling reasons which exist why the appeal should be heard such as the interests of justice... I am

mindful of the decisions at high court level debating whether the use of the word 'would' as opposed to 'could' possibly mean that the threshold for granting the appeal has been raised. If a reasonable prospect of success is established, leave should be granted... The test of reasonable prospects 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 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'.

[19] It is clear that the test whether the requirement of section 17(1) (a) of the Act is stringent. In the case of *MEC for Health, Eastern Cape v Mkhitha and Another* [2016] ZASCA 176 (25 November 2016) the court at para [16] that 'Once again it is necessary to say that leave, especially to this court, must not be granted unless there is truly a reasonable prospect of success. Section 17 (1) (a) of the Superior Courts Act 10 of 2013 make it clear that leave to appeal may only be given where the judge concerned is of the opinion that the appeal *would* have a reasonable prospect of success; or the there is some other compelling reason why it should be heard'.

[20] At para [17] the court continued to set the test as follows: ' An applicant for leave to appeal must convince the court on proper grounds that there is reasonable or realistic chance of success on appeal. A mere possibility of success, an arguable case of one that is not hopeless, is not enough. There must be sound, rational basis to conclude reasonable prospect of success on appeal'.

Analysis

[21] The above legal principles emphasise that the requirement for a successful leave to appeal is more than a possibility that another court *might* come to a different conclusion. The test is whether there is reasonable prospect of success that another court *would* come to a different conclusion.

[22] The applicant's contention are set out in the grounds detailed in the Notice of Appeal and amplified in the Heads of Argument. The respondent's contention in opposing the application for leave to appeal are contained in its Heads of Argument. In a nutshell the respondent contends that the application for leave to appeal enjoys no prospects of success and there exists no compelling reasons why the application

for leave to appeal should be granted and that the application for leave should be dismissed with costs.

[23] The applicant has persisted with its contention that indebtedness was established and that the respondent committed a fraud. Section 345 of the Old Act creates a rebuttable presumption that the respondent is unable to pay its debts. It is not a foregone conclusion that any failure to pay results in insolvency. In this regard the court relied in the case of *Body Corporate of Fish Eagle v Group Twelve Investments* 2003 (5) SA 414 (W) at 428B-C.

[24] In response to this alleged indebtedness the respondent has shown that it has security in the amount in excess of two million rand in the trust account of its attorneys. The respondent has also indicated that for a period of about ten years the applicant rented out the property. The length of time it took the applicant to enforce its rights appears to me as a factor militating against the acceptance of its version. The behaviour of the applicant during the that long period of time is not consistent with its present view that it owed money of entitled to refund of the purchase price.

[25] The applicant alleges fraud but appears not to dispute the corporate structure of the respondent. The respondent has submitted that it is a holding company of a trading company Xtraprops. In that way the allegation of fraud based solely on the corporate structure of the respondent does not arise.

[26] In my judgment I also emphasised the principle that liquidation proceedings are not to be used as debt collecting instrument. In the case of *Imobrite (Pty) Ltd v DTL Boerdery CC* (1007/2020) [2020] ZASCA 67 (13 May 2022) where the court stated as follows:

Para [14] 'It is trite that by their very nature, winding up proceedings are not designed to resolve disputes pertaining to the existence of or non-existence of a debt. Thus, winding up proceedings ought not to be resorted to enforce a debt that is bona fide (genuinely) disputed on reasonable grounds. That approach is part of the broader principle that the court's proceedings should not be abused'.

[27] At para [15] the court continued to state that ' A winding up order will not be granted where the sole or predominant motive or purpose of seeking the winding up order is something other than the bona fide bringing about of the company's liquidation. It would also constitute an abuse which is an abuse of process if there is an attempt to enforce payment of a debt which is bona fide disputed, or where the motive is to oppress or defraud the company or frustrate its rights'.

[28] I specifically made reference to the case of *Badenhorst supra*. This was specifically because the applicant was the only entity that approached the court seeking the winding up of the respondent.

[29] Given the state on the law in this regard and the factual findings I have made, I am not persuaded that another court would arrived at a different conclusion. I am not satisfied that the applicant has shown that the appeal would have a reasonable prospect of success as contemplated by section 17(1) (a) nor also that there are compelling reasons why the appeal should be heard as envisaged by section 17(1) (b).

Order

Application for leave to appeal dismissed with costs.

A handwritten signature in dark ink, appearing to be 'Thupaatlase', is written over a horizontal line. A black rectangular redaction box covers the middle portion of the signature.

THUPAATLASE AJ
ACTING JUDGE

GAUTENG LOCAL DIVISION JOHANNESBURG

Date of Hearing: 20 September 2024

Judgment Delivered: 13 February 2025.

For the Applicant: Adv. A Rossouw SC assisted by
Adv. M Jorge

Instructed by: Afzal Lahree Attorneys

For the Respondent: Adv. D Block

Instructed by: Delberg Attorneys
