



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

CASE NO: 21072/2019

REPORTABLE

In the matter between:-

NICO VAN WYK

PLAINTIFF

and

WILLEM JOHANNES VENTER NO.

FIRST DEFENDANT

ALETTA SUSARA MAGRIETA VENTER NO.

SECOND DEFENDANT

SHARL VENTER NO.

THIRD DEFENDANT

WILLEM GABRIEL JORDAAN NO.

FOURTH DEFENDANT

**(in their capacities as trustees of the
VENTER FAMILIE TRUST)**

Coram: MOOSA AJ

Heard: 18 June 2025

Delivered: 26 June 2025 (delivered via email to the parties)

ORDER

The plaintiff's application for leave to appeal is dismissed with costs, such costs to include counsel's party-and-party fees on Scale C.

JUDGMENT
(LEAVE TO APPEAL)

Moosa AJ:

[1] This judgment relates to plaintiff's application for leave to appeal my judgment and order of 12 May 2025 ('the order'). It is reported sub nom *Van Wyk v Venter NO and Others* [2025] ZAWCHC 197. I granted absolution from the instance with costs. As my principal judgment gives my reasons for the order, I do not traverse them here.

[2] For convenience sake, the parties are referred to as in my principal judgment.

[3] The plaintiff locates his application solely on the basis that there is a reasonable prospect of success. He asserts the following grounds of appeal: (i) that I applied the test for absolution wrongly on the facts for both his claims; (ii) that I erred in placing undue weight on selected documents favouring the defendants' defences and insufficient weight on the plaintiff's oral testimony and documents favouring the plaintiff's case, in particular the so-called 'red-flags letter'; and (iii) that I erred in finding that a presumption applicable to the enrichment claim did not apply in casu.

Applicable legal principles

[4] The principles governing applications for leave to appeal are now fairly settled. They are codified mainly in s 17(1) of the Superior Courts Act 10 of 2013. In this matter, it is not argued that any contentious point of law is at play deserving of an appellate court's attention; or that there is any other comparable 'compelling reason' as contemplated in s 17(1)(a)(ii) why the appeal should be heard (such as, a discreet issue of public importance requiring adjudication; or the presence of conflicting judgments on any matter arising in this case). Despite no other compelling reason being advanced by the plaintiff, I enquired into the existence of any such

ground. See *Caratco (Pty) Ltd v Independent Advisory (Pty) Ltd* 2020 (5) SA 35 (SCA) para 2. I did not find any ‘compelling reason’. Therefore, the enquiry here is singular, namely, whether I opine that a reasonable prospect exists that an appeal would succeed.

[5] In this case, an appeal is not about giving the plaintiff a second chance so that he gets another bite at the proverbial cherry to possibly (i.e., maybe) get a different outcome. Here, the intended appeal envisages the attainment of a different result. The plaintiff must demonstrate that an appellate court will (not might) find differently on crucial matters of fact or law which would bring about a different outcome. See *MEC for Health, Eastern Cape v Mkitha and Another* [2016] ZASCA 175 (25 November 2016) paras 16 - 17. This test for leave to appeal is more stringent than that which operated under the old Supreme Court Act, 1959. See *Notshukovu v S* (157/2015) [2016] ZASCA 116 para 2. A mere possibility that another court ‘might’ come to different conclusion, or that the case is arguable on appeal, or that the case may not be labelled as ‘hopeless’ is insufficient. The plaintiff must convince a judge ‘on proper grounds that he has prospects of success on appeal and that those prospects are not remote but have a realistic chance of succeeding’ (*S v Smith* 2012 (1) SACR 567 (SCA) para 7).

[6] Therefore, leave to appeal can be granted ‘only’ if I opine positively that a sound, rational basis exists to justify a conclusion that a realistic prospect exists that an appellate court would (not might) decide the absolution application differently (i.e., that absolution would not be granted). If not, then this application for leave to appeal must itself fail. See *Ramakatsa and Others v African National Congress and Another* [2021] ZASCA 31 (31 March 2021) para 10.

Application of the legal principles to the facts in casu

[7] The application for leave on both claims hinges largely on plaintiff’s testimony. His counsel submits that there was ‘nothing improbable about Nico’s evidence’ (para 24). Thus, he contends that I erred in the ‘rejection of Nico’s evidence’ (para 24). This ground for appeal is repeated in relation to both the enrichment claim and the loan claim. The problem with this ground is that the plaintiff’s evidence was not

rejected as 'improbable'. An example of this appears at para 89 of the main judgment. It records that I found that the plaintiff's estate was impoverished as he had testified.

[8] The application for leave to appeal in relation to both claims is underpinned by a common theme, namely, that I erred in not considering that it was never put to the plaintiff during cross-examination that Johan and/or Charl Venter would testify and that they would contradict the plaintiff's testimony in material respects for both claims.

[9] It is correct that it was never put to the plaintiff that either Johan or Charl Venter would testify. However, this is not a basis to merit an appeal. This is not a criminal trial where the accused's version, as s/he intends to testify, is to be put to a state witness(es) while s/he is in the witness box. In a civil trial, a cross-examination would be guided by the pleadings. Mr Bothma was required to pose questions to the plaintiff which elicited responses that he (Mr Bothma) could later argue either tended to prove a defence pleaded by the trustees of the Venter Familie Trust, and/or which tended to disprove the plaintiff's claim as pleaded and/or testified by him. Mr Bothma duly did so. Therefore, a key hook on which the plaintiff hangs his bid for leave to appeal holds no water. It cannot justify an opinion that a reasonable prospect exists for success.

[10] In the application for leave on both claims, plaintiff's oral testimony is elevated to high prominence and the documentary evidence that contradicts and, to a large extent, even destroys the substratum on which plaintiff's case is built in relation to both claims is downplayed. It is difficult to conceive on what basis an appellate court would conclude that, on the evidence viewed as a whole, the plaintiff proved a prima facie case in relation to his enrichment claim and loan claim in the sense discussed at paragraphs 6 to 7 of my principal judgment. Any prospect thereof is remote, at best.

[11] At the end of the plaintiff's case, all the evidence must be viewed as a whole. Plaintiff's testimony cannot be considered in isolation, nor may it be given more weight than it is entitled. Any perceived weakness(es) in the plaintiff's oral testimony

may be bolstered by other available evidence which may assist to establish a prima facie case. Similarly, any perceived strengths in the plaintiff's oral testimony may be undermined by other available evidence tendered at the trial. All this is important in casu because the plaintiff is a single witness with an interest in his case's outcome.

[12] The plaintiff's oral testimony had weaknesses identified in my main judgment. These were exacerbated by documentary evidence dealt with at the trial. All this merited a finding that the plaintiff failed to prove a prima facie case in relation to his twin claims. I have dispassionately examined the grounds advanced for leave to appeal. I find no good basis to justify an opinion that another court will hold differently.

[13] For the enrichment claim, the plaintiff must establish prima facie proof of, inter alia, the existence of a payment not only by himself to the Venter Familie Trust but also by the latter, represented by the plaintiff, to West Coast Packaging CC (WCP) in the form of a loan. See paragraphs 13 to 14 of the main judgment. In the pleadings, defendants disputed that the Trust was enriched at the plaintiff's expense in any sum.

[14] To prove that the plaintiff paid the R2m to WCP via Cape Waste Paper CC (CWP) in 2017 as alleged in the Particulars of Claim (the POC), the plaintiff relied on detailed ledgers of WCP.¹ The ledgers are part of the 'accounting records' maintained under s 56 of the Close Corporations Act 69 of 1984 (the CCA). The plaintiff testified that the accounting entries show the receipt of the R2m by WCP in three tranches (July, September, and October 2017). See paragraphs 17, and 101 to 102 of my principal judgment. At the end of the plaintiff's case, these facts are common cause.

[15] Under cross examination, the plaintiff was constrained to concede that the same ledger entries relied on by him show that each of the deposits was credited to his personal loan account. His loan account entries accord with s 56(1)(a) and (2) of

¹ According to para 6 of the POC, WCP was converted from a close corporation to a private company on 8 October 2018. This date falls outside of the financial year in which the R2m was paid as detailed in para 15 of the POC.

the CCA. At the end of the plaintiff's case, it is common cause that neither the R2m, nor any part thereof, was ever credited to a loan account held in the name of the Venter Familie Trust with WCP. The 2018 financials are aligned with the accounting records.

[16] The plaintiff testified that he was not responsible for the bookkeeping and that he was unaware that the R2m was not credited to the Trust's loan account with WCP. While it is common cause that the plaintiff was not responsible for the bookkeeping of WCP, it was disputed that he was unaware of the contents of his loan account entries. To enable members of corporations to have knowledge of accounting records, s 56(4) of the CCA is important. It reads: 'The accounting records shall be kept at the place or places of business or at the registered office of the corporation and shall, wherever kept, be open at all reasonable times for inspection by any member.' The plaintiff did not testify that this provision was not complied with, or that he was denied access to the accounting records. The evidence reveals that he had access whenever needed.

[17] Things get worse for the plaintiff as regards his application for leave to appeal. Section 56(2) of the CCA records that a corporation's accounting records must include all loans made by members, and every individual transaction in a member's loan account 'shall contain sufficient detail of individual transactions to enable the nature and purpose thereof to be clearly identified'. Each of the ledger entries relied on by the plaintiff pertaining to the three deposits listed in paragraph 15 of the POC comprising the R2m contain a narration. During his evidence in chief, the plaintiff relied on the description (i.e., narration) related to each ledger entry concerned to show that the deposits in question align with the averments made by the plaintiff in the POC.

[18] None of the details provided in relation to the three deposits listed in paragraph 15 of the POC indicate that their individual or collective nature and purpose is as averred by the plaintiff, namely, that the deposits are payments by the plaintiff to WCP on behalf of the Venter Familie Trust who is the true lender of the R2m (not plaintiff). Accordingly, the accounting records relied on by the plaintiff do not support his case.

[19] The accounting records relied on by the plaintiff were used to prepare the 2018 annual financial statements of WCP (the AFS). See paragraphs 103 to 104 of my main judgment. In accordance with s 58(2) of the CCA, the AFS: (i) records the aggregate of the members' loans as required by s 58(2)(c)); (ii) is 'in agreement with the accounting records' (s 58(2)(d)); and (iii) 'fairly present the state of affairs of the corporation as at the end of the financial year' (s 58(2)(b)). In accordance with s 58(3), plaintiff 'approved' the AFS by appending his signature to it.

[20] The law in the CCA gives weight to a member's signature and approval of annual financial statements. In accordance with s 58 read with s 56 of the CCA, I gave due weight to the fact that the plaintiff signed the AFS and its implications for his approval of the accounting records referred to therein on which the AFS is based. Therefore, it is wrong for the plaintiff to contend in his application for leave to appeal (at para 10.4) that I gave 'undue weight' to the fact that he signed the 2018 AFS. Doing the opposite would violate the relevant provisions of the CCA.

[21] At para 10.4 of his application, the plaintiff contends, as a ground of appeal, that while I gave undue weight to him signing the AFS, I gave 'insufficient weight' to the plaintiff's oral testimony 'that he was a silent partner and that Johan Venter (a chartered accountant) was responsible for preparing the accounts'. This ground of appeal lacks merit. By law, the plaintiff's signature means that he must shoulder legal responsibility for the AFS's contents and the implications as to its correctness.

[22] Plaintiff's counsel argued that reasonable prospects exist on appeal because, so he argued, I 'disregarded the fact that it was not put to Nico in cross examination that either of the Venters would testify that he [Nico] did examine the detailed ledger entries of his loan account in WCP. The main thrust of Mr Bothma's cross examination pertaining to the detailed ledger entries on which the plaintiff relied in his evidence in chief was Mr Bothma's statement to the plaintiff that the ledger entries concerned do not support the plaintiff's enrichment claim and actually supports the defendants' case (i.e., that it did not loan the R2m to WCP, nor that it did so at the plaintiff's expense).

[23] Paragraph 106 of my main judgment is to the effect that the plaintiff cannot rely on the ledger entries when it suits his case but then escape their implications when the same entries destroy, or seriously damage, a key part of his enrichment claim (i.e., they show that the R2m was loaned by the plaintiff to WCP, and not loaned by the Trust). The plaintiff does not advance any basis to justify a conclusion that an appellate court would permit him to use the detailed ledger to prove that he paid the R2m in 2017 to WCP via CWP (which is essential to be proved for purposes of his enrichment claim in the light of the defendants' denial thereof), but then the appellate court would overlook the fact that the same R2m aggregate payments are credited in WCP's books as a loan by the plaintiff to WCP (not by the Trust) and without any detail which indicate that their nature and purpose aligns with the plaintiff's case as pleaded by him.

[24] The plaintiff's case is weakened further by emails and other documents relied on by the plaintiff. His counsel dealt with the email by Mr Umpleby to Mr Harkers of ABSA (discussed at paragraphs 120 to 123 of my principal judgment), and clause 3.2 of the deed of sale in relation to WCP's intended acquisition of certain immovable property owned by the Trust (see paragraphs 124 to 131 of my main judgment). Mr Umpleby informed ABSA that the plaintiff funded his share of the purchase price via a R2m deposit into his loan account. Clause 3.2 of the deed is to the same effect. Mr Umpleby's statement and clause 3.2 are seriously damaging to the enrichment claim.

[25] The damage caused is patently clear by reason that the R2m concerned is the same R2m for which the plaintiff sues the defendants in his enrichment claim on the basis that he (the plaintiff) paid the R2m on the defendants' behalf to WCP and that the defendants (not the plaintiff) borrowed the R2m to WCP on loan account. The email by Mr Umpleby was relied on by the plaintiff during his evidence in chief for two purposes: first, to prove that the R2m paid by him related to his intended acquisition of a share in the immovable property owned by the Venter Familie Trust. In other words, the plaintiff relied on Mr Umpleby's email to prove the alleged enrichment by the Trust which its trustees disputed in the pleadings. Secondly, the email formed part of the background to the plaintiff's case relating to his loan claim.

[26] Mr Umpleby's statement to Mr Harkers of ABSA and the contents of clause 3.2 align with the accounting records of WCP and the AFS. All this is part of the tapestry of evidence weaved by Mr Bothma into, in my view, a cogent argument that an appellate court would not find that Mr Umpleby's statement and clause 3.2 of the deed of sale are factually incorrect, or for some other reason is not harmful to plaintiff's case.

[27] In the application for leave to appeal, plaintiff's counsel argued that '[i]t is quite conceivable that he [Mr Umpleby] formulated the last sentence of the email in question of his own accord without input from Nico'. When I pointed out that there are no facts to support this submission, plaintiff's counsel replied that he raised it as an arguable point on appeal. As stated above in paragraph 5, this is no longer a basis to grant leave to appeal.

[28] At the leave to appeal hearing, it was argued that reasonable grounds exist to believe that an appellate court will view the contents of the 'red-flags' reply letter sent on behalf of Johan and Charl Venter as a basis to find that the plaintiff's enrichment claim was proved on a prima facie basis so as to overcome the absolution application. No proper foundation exists for this ground of the intended appeal. It overlooks key facts that show the Venter's red-flags reply letter does not advance the plaintiff's case.

[29] The red-flags reply was presented to the plaintiff during his examination in chief. He was asked to testify about the indications therein that there were errors in the accounting entries of WPC. The background to this letter must first be understood.

[30] As stated in paragraphs 107 to 108 of my main judgment, the business of WCP was sold to Deer Ventures (Pty) Ltd (Deer Ventures). Some months after the effective date of sale, Mr Garth Cox sent an email in which he red-flagged aspects in the accounting records of WCP which were provided to Deer Ventures by the plaintiff and Charl Venter when they sold its business. Mr Cox was the new accountant for Deer Ventures and sought an explanation of some aspects in the accounting records.

[31] The plaintiff testified that he did not reply to the accounting related queries raised by Mr Garth Cox because he (the plaintiff) was not involved in the capturing of the accounting records and had no knowledge which would enable him to reply. The plaintiff testified that he left this matter entirely in the hands of Johan and Sharl Venter.

[32] This testimony is important. It underscores that the contents of the red-flags reply sent on behalf of Johan and Sharl Venter is beyond the plaintiff's knowledge. Indeed, to his credit, while in the witness box, the plaintiff did not permit himself to be drawn into the contents of the Venter's red-flags reply. He insisted that he could not comment on accounting related matters as they were beyond his knowledge. The plaintiff did not, and could not, testify to any of this as it fell beyond his knowledge. Any evidence that the plaintiff would have tendered in regard to the accounting errors now sought to be relied on by plaintiff's counsel would have carried no evidential weight.

[33] For these reasons, plaintiff's counsel does not rely on testimony given by the plaintiff relating to the contents of the red-flags reply pertaining to accounting errors. He relies on the document itself and the 'facts' that they purport to convey. This is problematic because the parties agreed to the usual terms as to the status of any document in the trial bundle. Thus, the facts in the red-flags letter require proof.

[34] To rely on any factual material in the Venter's red-flag's, the plaintiff was required to lead evidence as to its contents. In this context, Mr Garth Cox may have been useful. He would have been able to testify as to, inter alia, the nature of his accounting enquiries and the reasons for raising the queries in the first place; the Venter's red-flag's reply thereto and his understanding thereof from an accounting perspective; and his response to the Venter's reply (if any at all), including any direct engagement which he (Garth Cox) may have had with Johan and/or Sharl Venter in relation to the accounting errors which the plaintiff now seeks to rely on as the basis for contending that he proved that a loan of R2m was made by the Trust to WCP.

[35] Although a notice was given under rule 37A(10)(e) of an intention to call Mr Garth Cox to testify, he was not called as a witness. No sound, rational basis was advanced as to how an appellate court would, in these circumstances, use the contents of the Venter's red-flags letter for the plaintiff's benefit. I could not find any either, particularly in view of the approved and signed 2018 AFS.

[36] I also agree with Mr Bothma who pointed out, correctly so, that the Venter's red-flags letter post-dated the sale of WCP and the transfer of ownership thereof. Moreover, the letter did not, as a matter of fact or law, admit a debt by WCP to the Venter Familie Trust.

[37] It bears stating that a finding by this court (or an appellate court) that the Venter's red flag letter supports the existence of a R2m credit loan debt in favour of the Trust arising from the facts averred in the POC would give judicial imprimatur, even if only on a prima facie basis, to a claim by the Venter Familie Trust against Deer Ventures for this sum. Such judicial recognition would have serious legal ramifications which ought not to be countenanced for various reasons including, but not limited to, the fact that Deer Ventures is not joined as a party to this suit.

[38] In my principal judgment (at paragraphs 91 to 94) I found that, on a conspectus of the trial evidence, the defendants did not receive the R2m from the plaintiff. Based on the facts, I held that the presumption relied on by the plaintiff's counsel is inapplicable. The defendants denied the alleged enrichment and so they never pleaded a loss of the enrichment. The onus was, therefore, on the plaintiff to prove the enrichment. He failed to do so.

[39] There was no onus on the defendants to prove a loss of enrichment. No plausible basis was advanced on which I can justifiably sustain an opinion that, on the facts in the trial record, another court would come to a different conclusion than that reached by me on the issue of the presumption and its non-applicability here.

[40] As for the plaintiff's loan claim, a new alternative argument was advanced by the plaintiff's counsel in the application for leave to appeal, namely, that if the loan debt is 'conditional' on the re-advance of monies by ABSA to WCP as found by the

trial court, then there has been a fictional fulfilment thereof under the doctrine of fictional fulfilment. This argument does not hold water on the proved facts of this case.

[41] Since the doctrine of fictional fulfilment is an afterthought, the plaintiff did not plead his case in line with it, nor was evidence led which satisfies all the elements of this doctrine. For e.g., the POC does not allege conduct on the part of the defendant trustees that prevented fulfilment of the 'condition'; nor is it alleged that they acted with the intention to frustrate fulfilment of the condition; nor is it alleged that by virtue of the trustees' wilful conduct, the condition is deemed to be fulfilled; nor is the date of such deemed fulfilment pleaded. No evidence was led to any of this effect either. All this is consistent with the plaintiff's case that there was no 'condition' at play and that none needed to be satisfied in order for the plaintiff to be entitled to repayment of the loan.

Costs

[42] For all the reasons advanced above, the plaintiff's application must fail. There is no reason why costs should not follow in the defendants' favour.

Order

[43] In the result, the plaintiff's application for leave to appeal is dismissed with costs, such costs to include counsel's party-and-party fees on Scale C.

F. MOOSA
ACTING JUDGE OF THE HIGH COURT

Appearances

For Plaintiff: Adv J. Rogers

Instructed by: Bicarri Bollo Mariano Inc (Mr B Kurtz)

For Defendants: Adv. P-S. Bothma

(first to fourth defendants)

Instructed by: Hannes Pretorious Brock & Bryant (Mr H. Pretorious).