IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Not reportable
Case no: 4990/2021

In the matter between

LERICH RUWAYNE SMITH N O — **FIRST APPLICANT**
[In his capacity as business rescue practitioner
of Trackstar Trading 1409 (Pty) Ltd]

ETHNE MARY VAN WYK N O — **SECOND APPLICANT**
[In her capacity as business rescue practitioner
of Trackstar Trading 1409 (Pty) Ltd]

and

DANIEL THEODORUS VAN JAARSVELD — **FIRST RESPONDENT**

THE MASTER OF THE FREE STATE HIGH COURT: BLOEMFONTEIN — **SECOND RESPONDENT**

Neutral citation: *Smith N O & Another v Van Jaarsveld & Another* (4990/2021) [2025] ZAFSHC 292 (16 September 2025)
Coram: DE LA REY AJ
Heard: 1 September 2025
Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email and released to SAFLII. The date and time for

hand-down is deemed to be 12h00 on 16 September 2025.

Summary: Superior Courts Act 10 of 2013 – leave to appeal – exercise of judicial discretion in the true sense – duty to provide reasons. Whether the decision of a court can stand where it confirms general principles but fails to deal with any of the pertinent aspects raised in exercising of its discretion.

ORDER

1 The application for leave to appeal is granted to the Full Bench of this Honourable Court.

2 The cost of this application shall be costs in the appeal.

JUDGMENT

De la Rey AJ

Introduction

[1] The first respondent applies for leave to appeal against the judgment of Ntanga AJ, delivered on the 26th of June 2025 (court *a quo*).[1] The application for leave to appeal is opposed by the applicants.

[2] In summary, the court *a quo* granted an order in terms of which payments amounting to R387 287.23 made by Trackstar Trading 140 (Pty) Ltd (in liquidation) (Trackstar Trading) to the first respondent during the period November 2019 to December 2019, were declared void as contemplated in s 341(2) of the Companies Act 61 of 1973 (Companies Act).[2]

[3] The first respondent was ordered to pay the applicants the said amounts and interest *a tempore morae*. The first respondent's counter-application seeking validation of the payments was dismissed.

Leave to appeal prevailing legal position:

[4] Section 17(1)*(a)* of the Superior Courts Act 10 of 2013, regulates applications

[1] The judgment is reported sub-nom *Smith NO and Another v Van Jaarsveld and Another* [2025] ZAFSHC 189.

[2] Although this Act has been repealed by section 224 (1) of the Companies Act 71 of 2008, Chapter 14 is retained - see Schedule 5, paragraph 9 of the Companies Act 71 of 2008.

for leave to appeal and provides that:

'Leave to appeal may only be given where the judge or judges concerned are of the opinion that–

(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] The Supreme Court of Appeal in *MEC for Health, Eastern Cape v Mkhitha and Another*[3] explained s 17(1)*(a)* as follows:

'[16] Once again it is necessary to say that leave to appeal, especially to this court, must not be granted unless there truly is a reasonable prospect of success. Section 17(1)*(a)* of the Superior Courts Act 10 of 2013 makes 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 there is some other compelling reason why it should be heard.

[17] An applicant for leave to appeal must convince the court on proper grounds that there is a reasonable prospect or realistic chance of success on appeal. 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.

Grounds for appeal

[6] The first ground for appeal is that the court *a quo* erred in paragraph 20 of the judgment, in that it failed to appreciate that s 341 of s 341(2) only has retrospective powers from the deemed date of liquidation as a result of the provisions of s 348 of the Companies Act and therefore that any payment made after the application for liquidation has been issued but before liquidation has been granted is validly made and would only become void after the date of liquidation.

[7] Besides the fact that nothing turns on this interpretation in the matter under consideration, it is in direct contrast of the wording of s 341(2) of the Companies Act which provides:

'Dispositions and share transfers after winding-up void.

(1) ...

[3] *MEC for Health, Eastern Cape v Mkhitha and Another* 2016 ZASCA 176; 2016 JDR 2214 (SCA) paras 16 and 17.

Every disposition of its property (including rights of action) by any company being wound-up and unable to pay its debts made after the commencement of the winding-up, shall be void unless the Court otherwise orders.'

[8] As stated in *Pride Milling Company (Pty) Ltd v Bekker NO and Another* (*Pride Milling*):[4]

'The provisions of s 341(2) could not be clearer. They, in unequivocal terms, decree that every disposition of its property by a company being wound-up is void. Thus, the default position ordained by this section is that all such dispositions have no force and effect in the eyes of the law ie the disposition is regarded as if it had never occurred. The mischief that s 341(2) seeks to obviate is plain enough. It is to prevent a company being wound-up from dissipating its assets and thereby frustrating the claims of its creditors.'

[9] It was furthermore held in *Pride Milling*:[5]

'In *Engen Petroleum Ltd v Goudis Carriers (Pty) Ltd* (*In Liquidation*) the court held that the "primary purpose of s 341(2) is to address the anomaly that occurs as a result of the retrospective invalidation of dispositions by a company which were initially lawful and valid". This statement is not entirely correct. What s 341(2) does as its predominant purpose is to decree that all dispositions made by a company being wound-up are void. This provision must of course be read with s 348, which provides that the winding-up of a company by a court shall be deemed to have commenced at the time of the presentation of the application for winding up to the court. The effect is that the payments are potentially invalid at the moment they are made, because the grant of a winding-up order will render s 341(2) operative. This is different from saying that they are rendered invalid retrospectively, or that they were initially lawful and valid. That suggests that the invalidation of all such payments is presumptively harsh or undesirable, which is not the case.'

[10] Irrespective of the interpretation as advanced for the first respondent the payments totaling R387 287.23 were clearly void in the circumstances in which they were made.

[11] The second ground of appeal does not constitute a separate ground. Paragraph 23 of the judgment makes no finding but merely states the *de facto* legal

---

[4] *Pride Milling Company (Pty) Ltd v Bekker NO and Another* [2021] ZASCA 127; [2021] 4 All SA 696 (SCA); 2022 (2) SA 410 (SCA) (*Pride Milling*) para 30.
[5] *Pride Milling* para 13.

position in relating to first respondent's alternative options. The fact that the court *a quo* did not specify the available remedies in as much detail as stated in *Mazars Recovery & Restructuring (Pty) Ltd and Others v Montic Dairy (Pty) Ltd (in liquidation) and Others*[6] is of no consequence.

[12] The allegations in paragraphs 2.1.1 to 2.2 are no more than factors the court would have had to consider in the exercise of its discretion on whether to grant the relief sought in the first respondent's counterapplication.

[13] Regarding the third ground of appeal, it is hard to imagine how the first respondent, clearly knowing that his fees would be at risk because of the financial position of Trackstar Trading, did not, by making the payments to himself immediately prior to liquidation manufacture an undue preference to himself, irrespective of the other creditors of the estate. Even if it could be argued that the payments, were, because of the financial status of Trackstar Trading at the time, not an undue preference, the following passage from *Pride Milling*, although relating to payments made after provisional liquidation, seems equally applicable to first respondent:

'In the context of the facts of this case, validating the payments would mean that Pride Milling would be left to enjoy the benefit of its claim being settled in full, whilst the other creditors would have to be content with whatever residue might still be available.'[7]

[14] The grounds set out as the fourth ground of appeal is simply a repeat of what was stated earlier and again clearly relates to the factors that the court would have had to considered in exercising its discretion on whether to validate the payments. The fact that the first respondent's fees were undisputed and whether it was reasonably and duly earned are simply factors the court would have considered in the exercising of its discretion.

[15] During the hearing of this application, it transpired that leave to appeal the judgement of the full bench in *Smith N.O and Another v Magnus N.O and Others*[8] to the Supreme Court of Appeal has been granted. This matter is distinguishable from

---

[6] *Mazars Recovery & Restructuring (Pty) Ltd and Others v Montic Dairy (Pty) Ltd (in liquidation) and Others* [2022] ZASCA 135; 2023 (1) SA 398 (SCA) (*Mazars*) para 28.
[7] *Pride Milling* para 20.
[8] *Smith N.O and Another v Magnus N.O and Others* [2025] ZAFSHC 109; 2025 (5) SA 273 (FB).

the matter under consideration and the fact that leave to appeal was granted is inconsequential.

[16] The court was clearly alive to the factors that had to be considered in exercising its discretion as is evident in paragraphs 24, 26, and 33 of the judgment. The Court exercised its discretion in the true sense.[9] A court on appeal will thus only interfere if it can be demonstrated that the discretion was exercised capriciously, on a wrong principle or has not brought an unbiased judgement to bear on the questions it considered.[10]

[17] The position is encapsulated in the remarks of the Constitutional Court in *Giddy NO v JC Barnard and Partners*,[11] where it was said that an appellate court will not consider:

'. . . [W]hether the decision reached by the court of first instance was correct, but will only interfere in limited circumstances; for example, if it is shown that the discretion has not been exercised judicially or has been exercised based on a wrong appreciation of the facts or wrong principles of law. Even where the discretion is not a discretion in the strict sense, there may still be considerations which would result in an appellate court only interfering in the exercise of such discretion in the limited circumstances as mentioned above.'

[18] Whether leave to appeal should be granted thus centers on the court's exercise of its discretion in evaluating the counterapplication (to validate the payments or not).

[19] Whilst recognising the factors to be considered the court however did not, at least in the judgement pertinently apply them to the facts at hand, and merely stated that it had done so.[12]

[20] In hearing the application for leave to appeal this Court is thus blind as to the factors considered by the court *a quo* in the exercising of its discretion and cannot evaluate its refusal to validate the payments. It is for instance, impossible to ascertain

---

[9] *Pride Milling* para 22.
[10] *Pride Milling* para 23.
[11] *Giddy NO v JC Barnard and Partners* 2006 (ZACC) 13; 2007 (5) SA 525 (CC); 2007 (2) BCLR 125 (CC) para 19.
[12] Op cit fn 1 para 31.

to what extent the reasonableness of first respondent's fees which appears to stand uncontested, the fact that he had to continue with the execution of his duties as business rescue practitioner pending the liquidation and the fact that his fees would have ranked preferent against the free residue played any role in the court's assessment. In the absence of any details by the court *a quo* it is impossible to state whether the court exercised its discretion judicially.

[21] Purely because of the court *a quo*'s failure to deal with any of the pertinent aspects raised in the seeking of validation, which would have been essential in the exercising of its discretion, I am of the opinion that a court on appeal would be free in determining the matter in as far as it relates to the exercising of the court *a quo*'s discretion and would be entitled to substitute its exercise of the discretion with that of the court.

[22] I thus do believe that an appeal would have a reasonable prospect of success. The submission that clarity needs to be obtained regarding the payment of business rescue practitioners finding themselves in similar circumstances, has already been considered[13] and is not, in this Court's opinion reason to grant leave to appeal to the Supreme Court of Appeal.

[23] In the result the following orders are granted:

1 The application for leave to appeal is granted to the Full Bench of this Honourable Court.

2 The cost of this application shall be costs in the appeal.

[redacted]

DE LA REY AJ

ACTING JUDGE OF THE HIGH COURT

---

[13] *Mazars* para 13

Appearances

For the appellant:	P Zietsman SC
Instructed by:	Phatshoane Henney Incorporated, Bloemfontein
For the first respondent:	P J J Zietsman SC
Instructed by:	Tintingers Incorporated, Pretoria c/o Honey Attorneys, Bloemfontein.