IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

(1)	REPORTABLE	NO
(2)	OF INTEREST TO OTHER JUDGES	NO
(3)	REVISED	YES
	DATE	SIGNATURE

CASE NO: 2025-059360

In the matter between

KARUNAGAREN NAIDOO N.O First Applicant

EMPEROR FOODS (PTY) LTD (IN BUSINESS RESCUE) Second Applicant

and

NEDBANK LTD Respondent

JUDGMENT: LEAVE TO APPEAL

ANDRÉ GAUTSCHI AJ

[1] This is an application for leave to appeal by the applicants, whose application I dismissed with costs on 10 November 2025. In this judgment I use the same terminology as in my main judgment.

[2] The test I am enjoined to apply has been stated as follows:

> "… section 17(1)(a) of the Superior Courts Act 10 of 2013 makes it clear that leave to appeal may only be given when 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.
>
> 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 reasonable prospect of success on appeal[1].

[3] The applicants' case has changed from the founding papers to the application for leave to appeal. In basic terms, its case in the founding papers was that the respondent had been entitled to collect the debts sold and purchased under the IDA but was not entitled to collect any further debts under the Cession to pay off the Term Loan or the instalment sale agreements.

[4] The argument before me in the application for leave to appeal deviated from and was not entirely covered by the notice of application for leave to appeal. I shall nevertheless engage with the merits of the argument.

[5] Counsel for the applicants submitted before me that once the IDA was cancelled, restitution had to take place, and Nedbank was no longer the owner of the book debts not yet collected. The reliance on restitution is misplaced. Clause 18.4 of the IDA provides that:

> "18.4 In the event of cancellation, and notwithstanding same, the Seller's obligations will continue in respect of each Debt purchased by Nedbank prior to such cancellation and remain of full force and effect until all amounts owing to Nedbank have been paid in full."

and clause 24.3 provides that:

> "24.3 In the event of any termination the parties' obligations will continue in respect of each Debt purchased by Nedbank prior to the expiration of such notice and remain of full force and effect until all amounts to Nedbank have been paid in full."

[6] These clauses make it clear that a cancellation or termination does not require restitution, but provides for the parties' obligations to continue until Nedbank has been settled in full.

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1 MEC for Health, Eastern Cape v Mkhitha (1221/15) [2016] ZASCA 176 (25 November 2016) at paragraphs 16 and 17

[7] It is also incorrect that Nedbank, after cancellation of the IDA, was no longer the owner of any book debts which it had purchased but not yet collected. The IDA is clear that ownership of debts passed to Nedbank on delivery, which is effectively the act of cession, and given the clauses quoted above which provide for obligations to continue after cancellation or termination, Nedbank does not, at common law, lose ownership of the debts merely because it has cancelled the IDA.

[8] Counsel for the applicants then relied on section 133 of the Companies Act, 2008 which provides for a moratorium on legal proceedings with the advent of business rescue. Regard must however be had to sections 134(3) and 136(2A)(c), which preserve security held.

[9] I had relied in the main judgment on the cases of BP Southern Africa[2] and Kritzinger[3]. The applicants contend that those cases were wrongly decided and that I erred in relying on those.

[10] Not only were those cases followed in Van den Heever NO v Van Tonder[4] but they are also in line with the SCA decision in Louis Pasteur Holdings[5], where section 134(3) of the Act was analysed and the judgment concluded with the following:

> "Obviously, the security held by a person in relation to a debt owed by a company in business rescue, is not nullified by the business rescue procedure."[6]

[11] There is therefore no merit in the new approach by the applicants that Nedbank had wrongly collected the book debts under the IDA. The question then still remains,

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2 BP Southern Africa (Pty) Ltd v Intertrans Oil SA (Pty) Ltd and Others 2017 (4) SA 592 (GJ) at para 45

3 Kritzinger v Standard Bank of South Africa [2013] ZAFSHC 215 at para 49

4 2021 JDR 2612 (GJ) (a Full Bench decision)

5 Louis Pasteur Holdings (Pty) Ltd and Others v ABSA Bank Ltd and Others 2019 (3) SA 98 SCA at paras 22 and 23

6 Louis Pasteur Holdings *supra* at para 23

whether Nedbank had been entitled to collect further book debts under the Cession to settle the Term Loan and the instalment sale agreements.

[12] The position may be put simply as follows: A cession *in securitatem debiti,* which is the type of cession at play in the Cession, allows the cessionary to collect the book debts of the company (the second applicant) and precludes the company from collecting those book debts itself. The authorities are to the effect that that position does not change with the advent of business rescue. The applicants conceded in the main application (correctly in my view) that Nedbank had been entitled to collect the book debts under the IDA, but complained about its collection of book debts under the Cession. Nedbank's rights are however in my view no different under the Cession from the rights under the IDA. In each case it held security in the form of a cession.

[13] Counsel for the applicants also submitted that Nedbank ought to have obtained the BRP's consent to collect the book debts. But section 134(3) requires the BRP to obtain Nedbank's consent to dispose of property over which another person (in this case Nedbank) has any security, and not the other way around.

[14] Counsel for the applicants also repeated the submission made in the main application, namely that book debts collected had been appropriated to the Term Loan and the two instalment sale agreements before the outstanding balance on the IDA had been settled, and therefore Nedbank was using "its own money" to settle those debts. I rejected that submission in my main judgment, and I am not persuaded that it has any merit, even after having reconsidered it. The fact is that the respondent was entitled to collect the book debts (its security) under both the IDA and the Cession, and it does not matter in my view in what order these were collected.

[15] Finally, I was implored that there was a need for certainty for business rescue practitioners, and that my main judgment allows for a creditor holding security to be preferred. That is however exactly what the Companies Act allows for a creditor holding security. In my view there is sufficient certainty regarding the respective rights of business rescue practitioners and creditors holding security.

[16] I am accordingly not satisfied that there is a reasonable prospect of another court coming to a different conclusion, or that there is any other compelling reason for leave to appeal to be granted.

[17] The application for leave to appeal is dismissed with costs, the costs of counsel to be taxed on High Court Scale C.

[redacted]

ANDRÉ GAUTSCHI
Acting Judge of the High Court

Date of hearing:	30 January 2026
Date of judgment:	4 March 2026
Counsel for the applicants:	Adv N Nortjé (Instructed by Gothe Attorneys Inc)
Counsel for the respondent:	Adv M de Oliveira (Instructed by Kim Warren Attorneys)

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