

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NUMBER: 2024/017128

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

H. LOUW AJ **6 March 2026**

In the matter between:

ABSA BANK LIMITED

**Applicant / Respondent in
the Leave to Appeal**

and

**25 CENTRE PROPERTY HOLDINGS CC (Registration
Number 2000/069957/23)**

**Respondent / Applicant in
the Leave to Appeal**

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JUDGMENT – LEAVE TO APPEAL

LOUW H AJ:

[1] In this matter, the Applicant for Leave to Appeal, 25 CENTRE PROPERTY HOLDINGS CC (Registration Number 2000/069957/23) (“Centre Property Holdings”), applied for Leave to Appeal against the whole of the Judgment and

Order in which this Court granted the winding up of Centre Property Holdings at the hands of the Master, with costs in the winding up.

- [2] The Respondent herein, ABSA BANK LIMITED (“ABSA Bank”), opposed the application.
- [3] During February 2024, ABSA Bank, the Applicant in the main application, launched an application seeking that “*the Respondent (Centre Property Holdings) be and is hereby wound up in the hands of the Master of the above Honourable Court*” and that the costs of the application be costs in the winding up of Centre Property Holdings. ABSA Bank did not seek either a money judgment or execution relief against Centre Property Holdings’ immovable property, which is residential premises.
- [4] The Centre Property Holdings caused the required Notice of Intention to Oppose to be filed on or about 28 March 2024, with the consequent filing of a Default Judgement Application in the absence of an Answering Affidavit, resulting in the final winding up of Centre Property Holdings on 7 May 2024, which was rescinded on 29 October 2024.
- [5] Centre Property Holdings further caused an Answering Affidavit to be filed on or about 8 May 2025, also seeking condonation¹ for the some six months' late filing thereof, followed by the subsequent filing of a Replying Affidavit on 22 May 2025.

¹ Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining and Development Company Limited and others [2013] 2 All SA 251 (SCA)

[6] The liquidation application came before me in terms of section 69(1)(a)² and 66³ of the Close Corporation Act 69 of 1984, read with Schedule 5 of the Companies Act 71 of 2008, and read with sections 344 and 345 of the Companies Act 61 of 1973,⁴ with the allegation that Centre Property Holdings failed to make payment of the outstanding indebtedness owed to ABSA Bank, notwithstanding the lapse of a period of 21 days pursuant to receiving demand, Centre Property Holdings was thus deemed to be unable to pay its debts and therefore susceptible to winding up, in circumstances where Centre Property Holdings bore the onus⁵ to demonstrate that it was solvent, considering the deeming provision.

[7] This Court dismissed the fatally inadequate Condonation Application, there being no defence, and the defence based upon non-compliance with the provisions of the Uniform Rules of Court, Rule 46A, and granted the winding up of Centre Property Holdings at the hands of the Master, with costs in the winding up. It is against this Judgement that Leave to Appeal is sought, only with reference to the alleged non-compliance with the provisions of Rule 46A.

[8] The Grounds of Appeal are set out in the Application for Leave to Appeal.⁶

Principles governing applications for Leave to Appeal

[9] The test to be applied in an Application for Leave to Appeal is set out in Section 17(1)(a) of the Superior Courts' Act 10 of 2013, which provides that:

² Section 69 - *Circumstances under which corporation deemed unable to pay debts*

(1) For the purposes of section 68 (c) a corporation shall be deemed to be unable to pay its debts, if-

(a) a creditor, by cession or otherwise, to whom the corporation is indebted in a sum of not less than two hundred rand then due has served on the corporation, by delivering it at its registered office, a demand requiring the corporation to pay the sum so due, and the corporation has for 21 days thereafter neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor;

³ Section 66 -

⁴ Section 344 *Circumstances in which company may be wound up by Court*, Section 345 *When company deemed unable to pay its debts*

⁵ *Afgri Operations Ltd v Hamba Fleet (Pty) Ltd* 2022 (1) SA 91 (SCA) at [17], *ABSA Bank Ltd v Tamsui Empire Park 1 CC* [2013] ZAWCHC 187 (WCC 1151/2013) at para 24

⁶ caselines 019-2

“(1) Leave to appeal **may only be given** where the judge or judges concerned are of the opinion that—

- (a) (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;
- (b) the decision sought on appeal does not fall within the ambit of section 16(2)(a); and
- (c) where the decision sought to be appealed does not dispose of all the issues in the case, the appeal would lead to a just and prompt resolution of the real issues between the parties.”

(own emphasis)

[10] Section 16 - Appeals generally provides in (2)(a)

- “(2)(a) (i) When at the hearing of an appeal the issues are of such a nature that the decision sought will have no practical effect or result, the appeal may be dismissed on this ground alone.
- (ii) Save under exceptional circumstances, the question whether the decision would have no practical effect or result is to be determined without reference to any consideration of costs.”

[11] The threshold for granting leave to appeal was raised with the introduction of the 2013 legislation. The former assessment that authorisation for appeal should be granted if “*there is a reasonable prospect that another Court might come to a different conclusion*” is no longer applicable. The words in section 17(1) that: “Leave to appeal may only be given” and section 17(1)(a)(i) that: “The appeal would have a reasonable prospect of success” (my emphasis) are peremptory. Thus, leave to appeal *may only* be given if there *would be* a reasonable prospect of success. Therefore, a possibility and discretion were, in the words of the legislation and consciously so, amended to a mandatory

obligatory requirement that leave may not be granted if there is no reasonable prospect that the appeal will succeed.⁷

[12] In *South African Breweries (Pty) Ltd v The Commissioner of the South African Revenue Services*,⁸ the Court cited with approval the following passage from *Mont Chevaux Trust v Goosen*⁹ concerning the apparent rigid section 17(1) threshold to grant a party leave to appeal, it to be granted in the circumstances set out and deduced from the word “only” used in the section: *“It is clear that the threshold for granting leave to appeal against a judgment of the High Court has been raised in the new Act. The former test whether leave to appeal should be granted was reasonable prospect that another court might come to a different conclusion. See Van Heerden v Cornwright and Others 1985 (2) SA 342 (T) at 343H. The use of the word “would” in the new statutes indicates a measure of certainty that another court will differ from the Court whose judgment is sought to be appealed against.”*

[13] In *Four Wheel Drive v Rattan NO*¹⁰ Schippers JA stated the following: “[34] *There is a further principle that the Court a quo seems to have overlooked – leave to appeal should be granted only when there is ‘a sound, rational basis for the conclusion that there are prospects of success on appeal’.*” This followed and confirmed the principle and test of reasonable prospects of success in an application for leave to appeal in *S v Smith*,¹¹ at [7]: *“What the test of reasonable*

⁷ *Bester NO and others v CTS Trailers (Pty) Ltd and another* (Leave To Appeal) 2021 (4) SA 180 (WCC), *Cloete Murray NO and others v Ntombela and others; In re: Ntombela and another v Cloete Murray NO and others* [2022] 3 All SA 689 (FB)

⁸ [2017] ZAGPPHC 340 (28 March 2017) para 5

⁹ 2014 JDR 2325 (LCC) para 6

¹⁰ 2019 (3) SA 451 (SCA) by Schippers JA (Lewis JA, Zondi JA, Molemela JA and Mokgohloa AJA concurring)

¹¹ *S v Smith* 2012 (1) SACR 567 (SCA) para 7 by Plasket AJA (Cloete JA and Maya JA concurring), *Pretoria Society of Advocates and others v Nthai* 2020 (1) SA 267 (LP)

prospects of success postulates is 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 order to succeed, therefore, the appellant must convince this Court 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. More is required to be established than that there is a mere possibility of success, that the case is arguable on appeal or that the case cannot be categorised as hopeless. There must, in other words, be a sound, rational basis for the conclusion that there are prospects of success on appeal.”

[14] In *MEC Health, Eastern Cape v Mkhitha*¹² the Supreme Court of Appeal emphasised the application for the test for leave to appeal and found:

“[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.

[18] In this case the requirements of 17(1)(a) of the Superior Courts Act were simply not met. Leave to appeal should have been refused. In the result, scarce public resources were expended: a hopeless appeal was prosecuted at the expense of the Eastern Cape Department of Health and ultimately, taxpayers; and valuable court time and resources were taken up

¹² (1221/15) [2016] ZASCA 176 (25 November 2016)

in the hearing of the appeal. Moreover, the issue for Decision did not warrant the costs of two counsel.”

[15] Although the views of the Courts may differ, it will not automatically result in interference with the Judgement of the Court appealed against, given a difference in opinion by the Court sitting on appeal.¹³ More is required, in *Ramakatsa and others v African National Congress and another*¹⁴ it was held at [10] *“Turning the focus to the relevant provisions of the Superior Courts Act The, leave to appeal may only be granted where the 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. The test of reasonable prospects of success 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.”*

[16] The procedural and substantive importance of applying for leave to appeal cannot be overstated. The Supreme Court of Appeal held in *Dexgroup (Pty) Ltd v Trustco Group*¹⁵ that: - *“The need to obtain leave to appeal is a valuable tool in*

¹³ *AM and another v MEC Health, Western Cape* (1258/2018) [2020] ZASCA 89, [2020] JOL 48031 (SCA)

¹⁴ [2021] JOL 49993 (SCA), *S v Notshokovu and Another* [2016] ZASCA 112 (7 September 2016) para 2

¹⁵ 2013 (6) SA 520 (SCA) paragraph [24], see also *The Public Protector of South Africa v The Chairperson of the Section 194(1) Committee and Others* (627/2023) [2024] ZASCA 131 (1 October 2024)

ensuring that scarce judicial resources are not spent on appeals that lack merit. It should, in this case, have been deployed by refusing leave to appeal.”

[17] Consequently, the requirement for successful Leave to Appeal is more than a mere possibility that another Judge might come to a different conclusion. The test is whether there is a reasonable prospect of success that another judge would come to a different conclusion. I consider the Application for Leave to Appeal and the Grounds for Appeal against this legal backdrop. Although the Application reflects that Leave is sought against the entire judgement, it does not appear so from the Grounds or the argument.

Grounds of Appeal and Submissions on the Grounds of Appeal

[18] In the Judgement, various issues were referred to, which included the dismissal of the Condonation Application, with costs, not allowing for the receipt and consideration of the Answering Affidavit, which also did not disclose a defence regarding the merits of the matter and the indebtedness of Centre Property Holdings resulting in the application for its liquidation in terms of section 69(1)(a)¹⁶ and 66¹⁷ of the Close Corporation Act 69 of 1984, read with Schedule 5 of the Companies Act 71 of 2008, and read with sections 344 and 345 of the Companies Act 61 of 1973.

¹⁶ Section 69 - *Circumstances under which corporation deemed unable to pay debts*

(1) *For the purposes of section 68 (c) a corporation shall be deemed to be unable to pay its debts, if-*

(a) *a creditor, by cession or otherwise, to whom the corporation is indebted in a sum of not less than two hundred rand then due has served on the corporation, by delivering it at its registered office, a demand requiring the corporation to pay the sum so due, and the corporation has for 21 days thereafter neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor;*

¹⁷ Section 66 -

[19] The defence in the main application and the Grounds of Appeal centre around the provisions of Rule 46A of the Uniform Rules of Court, “*Execution against residential immovable property*”, Centre Property Holdings stating that the Court erred and should not have wound up Centre Property Holdings in that ABSA Bank was required to proceed with the attachment of Centre Property Holdings’ immovable property and its sale, rather than proceeding by way of winding up proceedings.

[20] It was further alleged that in the exercise of discretion not to allow the winding up, the Court should have considered whether there was reason to believe that the winding up would be to the advantage of creditors of Centre Property Holdings, with specific reference to the matter of *Waterkloof Boulevard Homeowners Association (Association Incorporated under Section 21) v Yusuf and Another*.¹⁸

[21] Consequently, if the provisions of the *Waterkloof Boulevard* matter were applied, with reference to sequestration proceedings, the Court should have considered in liquidation proceedings, in the exercise of its discretion, that no case was made out that there was either an impeachable transaction, the concealment of assets and other irregularities which could be detected, exposed and remedied by way of winding up. Therefore, ABSA Bank had failed to make out a case that winding up proceedings would benefit it more than a sale in execution, which required the exercise of discretion against winding up.

¹⁸ (028945/2022) [2023] ZAGPPHC 737 (28 August 2023)

[22] By way of the Leave to Appeal, it was further put forward as a Ground that the Court erred in finding that the Faber Family did not fall within the primary residence of the judgement debtor sub-category provisions¹⁹ and thus incorrectly did not invoke the provisions of Rule 46A, considering the Constitutional Court decision of *Petrus Johannes Bestbier and Others v Nedbank Limited* (Bestbier)²⁰. As such, the Court should have found that had ABSA Bank not elected winding up proceedings, and the fact that the residential property was registered in the name of a Close Corporation, did not preclude the application of section 26 of the Constitution²¹ and High Court Rule 46A.

[23] The Court thus further erred in not finding that Rule 46A was applicable to the dispute between the parties and should have non-suited ABSA Bank in winding up proceedings because of the exercise of discretion against winding up, preventing the Farber Family from invoking the Rule 46A safeguards, the safeguards including the setting of a reserve price to achieve parity with the amount outstanding.

[24] In argument, Mr Cohen confirmed that the essence of the Appeal referred to paragraphs [27] to [29] of the Judgement, considering the *Bestbier* matter and the fact that the Centre Property Holdings property was an immovable residential property, with reference to the following:

“[27] In argument, Mr Cohen, acting on behalf of the Respondent, only relied on the application of Rule 46A to winding up proceedings where a

¹⁹ High Court Rule 46A (2)(a)(i) and (ii), Rule 46A (2)(2)(b) and Rule 46A (8)(d)

²⁰ 2024 (6) BCLR 741 (CC), 2024 (4) SA 331 (CC)

²¹ Constitution of the Republic of South Africa 1996, Section 26 "Housing"

residential property is involved, with reference to the matter of The Body Corporate of Old Trafford v Alfred Murozi in which Strydom AJ (as he was then) adjudicated in sequestration proceedings, confirming that an Applicant may elect to launch sequestration proceedings with the effect to circumvent the Rule 46A procedure, sequestration proceedings being recognised as a legitimate form of execution against an individual. That, according to Strydom AJ, raised the question whether by electing to follow the sequestration procedure (execution versus sequestration), a Court to take a mechanical approach in deciding those types of sequestration applications.

[28] *Strydom AJ found that a Court need not follow such mechanical approach in sequestration proceedings in that it has a discretion in terms of the provisions of the Insolvency Act, specifically the provisions of section 12(1) thereof, requiring the Court to consider the advantage to creditors as a discretionary provision as well as special or unusual circumstances justifying a refusal of sequestration, a further discretionary provision.*

[29] *The Respondent then argued with reference to sequestration as execution procedure that there is no basis for the winding up of the Respondent in liquidation proceedings in that the Applicant, in the absence of other creditors, invoked liquidation proceedings against the Respondent, 25 Centre Property Holdings CC, to bypass Section 26 of the Constitution, the right to housing and Rule 46A of the Uniform Rules of Court, in circumstances where the Farber Family is not a Respondent in the matter, not a judgement debtor, not a party to the agreement and not joined, had not disclosed a right of occupation in circumstances where the Applicant does not seek execution against the immovable residential property belonging to the Respondent, nor the eviction of the Farber Family.”*

[25] In the argument, Mr Cohen also referred to the finding by the Constitutional Court in *Bestbier* with reference to the following:

“[81] It must be borne in mind that rule 46A applies not only to executions against “primary residential immovable property” but to residential immovable property of a judgment debtor. The factor pertaining to primary residence is just one of the factors a court must consider. The text is clear that the rule applies whenever an execution creditor seeks to execute against the residential immovable property of a judgment debtor. When applying rule 46A(2)(a)(i), one of the factors that the court must consider is whether the residential immovable property is used as the primary residence of the judgment debtor.

[82] The Supreme Court of Appeal in its judgment moved from the premise that trust beneficiaries and farmworkers’ section 26 rights are clearly distinguishable, and that rule 46A does not find application because farmworkers are entitled to adequate legislative safeguards against eviction, such as ESTA, in the event of their eviction. It is this that I now turn to consider.”

[26] The Constitutional Court, in *Bestbier* confirmed the view by the Supreme Court of Appeal and posed the question “[89] *What then would be the situation of other persons who occupy the immovable property for residential purposes? Here I have in mind the rights of tenants occupying property through a lease agreement. A tenant’s right to occupy the property, in the event of a sale, may be protected through the Roman-Dutch law rule of huur gaat voor koop, (lease enjoys preference over sale). The underlying principle behind this rule is that, in the event of the sale of the property, the new owner steps into the shoes of the previous owner when it comes to the rights and obligations in terms of the lease agreement.*”

[27] The Constitutional Court also confirmed that “[90] *In the case of lessees, the huur gaat voor koop rule would safeguard the position of a lessee where execution is*

levied against unmortgaged property. In the case of mortgaged property, the rule would likewise safeguard the lessee if the lease was concluded before the mortgage bond was registered. Where, however, the lease was concluded after the registration of the mortgage bond, the rule is that the property must first be put up for sale subject to the lease. If the property does not realise sufficient funds to discharge the secured indebtedness, the mortgagee can insist on the property being put up for sale free from the lease, and the lessee's right of occupation would then be imperilled by the sale in execution and in such a case notice to the lessee might be required in terms of rule 46A(3)(b)."

[28] In order for Centre Property Holdings to be successful in its Application for Leave to Appeal as a consequence of the provisions of Rule 46A, it is required to fall within the qualifying provisions of sub-rule 1, which provides that “(1) *This rule applies whenever an execution creditor seeks to execute against the residential immovable property of a judgement debtor*”, in circumstances where the Farber Family are not party to these proceedings and the residential immovable property forming the subject of the dispute is registered in the name of a Close Corporation, a juristic entity with whom the Farber Family presumably has some contractual arrangement for the use and occupation of the immovable residential property.

[29] Further, whichever rights the Farber Family may have associated with the immovable residential property (the Farber Family not being a Judgement Debtor and the immovable residential property not being a Judgement Debtor's primary residence) would be protected as referred to in paragraphs [89] and [90] of *Bestbier* and the further invocation of the safeguards in the matter of *Body*

*Corporate of Old Trafford*²² has no application in these liquidation proceedings, that matter having application to sequestration proceedings, sequestration proceedings being recognised as a legitimate form of execution against an individual.

[30] In addition, in *Gundwana v Steko Development CC*²³ the Constitutional Court also expressed the view that (eventual) execution in itself is not an odious thing and is part and parcel of normal economic life and only in circumstances of disproportionality between the means used in the execution process to extract payment of the judgement debt, compared to other available means to attain the same purpose, alarm bells should start ringing, and if there are no other proportionate means to obtain the same end, execution may not be avoided. However, in this matter, ABSA Bank has not yet sought execution.

[31] I have again considered all of the issues raised by the Applicant for Leave to Appeal, and for the reasons set out herein and in the main judgment, the provisions of Rule 46A are not applicable to the current winding up of Centre Property Holdings.

[32] I, therefore, find that there is no reasonable prospect that another Court would come to a different decision based on the Grounds of Appeal, considering the provisions of Rule 46A.

²² *Body Corporate of Old Trafford v Muronzi* (016676/2023) [2024] ZAGPPHC 623 (21 June 2024)

²³ 2011 (3) SA 608 (CC) at 54

For the reasons set out above, I make the following order:

A. The application for leave to appeal is dismissed.

B. The cost of this application is to be crossed in the winding up of the Applicant
for Leave to Appeal.

[REDACTED]

H. LOUW

Acting Judge of the High Court
Gauteng Division, Johannesburg

Date of Judgment: 6 March 2026

Appearances

For Applicant: Adv C Denichaid
Instructed by: Jay Mothoi Incorporated

For Respondent: Adv R Cohen
Instructed by: Davids Incorporated