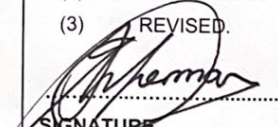


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case No: 21746/2019

(1)	REPORTABLE: No
(2)	OF INTEREST TO OTHER JUDGES: No
(3)	REVISED.
 SIGNATURE	5/03/2023 DATE

In the matter between:

VAN DEN HEEVER, THEODOR WILHELM N.O.

First Plaintiff

JANANT DAJI PIMA N.O.

Second Plaintiff

MONIQUE STANDER N.O.

Third Plaintiff

and

RC CHRISTIE INCORPORATED

First Defendant

WAYNE ALLEN GRACE

Second Defendant

RONNIE DENNISON

Third Defendant

This judgment was handed down electronically by circulation to the parties' legal representatives by email. The date and time for hand-down is deemed to be 14h00 on 6 March 2023

JUDGMENT

INGRID OPPERMAN J

[1] This is an application for leave to appeal to the full court of the Gauteng Division or to the Supreme Court of Appeal, against a judgment handed down by this court on 16 November 2022 (*'the judgment'*), which should be read with this judgment. The parties in this application for leave to appeal are referred to as in the judgment and all abbreviated descriptions used herein are as defined in the judgment.

[2] The court's power to grant leave to appeal to a higher court is found in section 17(1) of the Superior Courts Act, 2013.¹ This application for leave to appeal was argued relying exclusively on section 17(1)(a)(i) i.e. that the envisaged appeal would have reasonable prospects of success, and I thus confine this judgment to that subsection only.

[3] Leave to appeal should be granted only when there is a sound and rational basis for doing so². The threshold for granting leave to appeal has been raised³. The principles that emerge from *Four Wheel Drive* and *Independent Examinations Board* require that the court test the grounds on which leave to appeal is sought against the

¹ Section 17(1) of the Superior Courts Act provides:

"(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."

² *Four Wheel Drive Accessory Distributors CC v Rattan* 2019 (3) SA 451 (SCA)

³ *Independent Examinations Board v Umalusi and Others* (83440/2019) [2021] ZAGPPHC 12 (7 January 2021)

facts of the case and the applicable legal principles to ascertain whether an appeal court "would" interfere in the decision against which leave to appeal is sought.

[4] I have considered the extensive application for leave to appeal and hold the view that most of the grounds have been adequately answered in the judgment to the extent that the test for leave to appeal is not passed.

[5] The source of the R1,664,207 held by Water Africa's attorneys is common cause. The issue in the trial was whether such fund was the property of Water Africa as understood in the Insolvency Act. This concept is much wider than the common law concept of ownership.

[6] The purpose of the tender of placing the funds with the attorneys of Water Africa was to avert the winding-up of Water Africa, in other words to reassure DPI Plastics that sufficient funds were available within Water Africa to satisfy the admitted indebtedness and to persuade the court not to liquidate Water Africa as it was not insolvent.

[7] This was the intention behind placing the funds with the attorney for Water Africa, to avert Water Africa from being liquidated. This could only be achieved if the funds deposited with the attorney were the property of Water Africa at the time of the tender in the sense of funds available to Water Africa to meet its obligation to DPI Plastics.

[8] A loan to Water Africa which was *not* available to Water Africa to meet its obligations to DPI Plastics, even if the loan were advanced to Water Africa by its directors, would not have achieved the objective of appeasing DPI Plastics' concerns about being paid.

[9] The suggestion that the money in the trust account was not Water Africa's property was rejected by this court in the judgment on a factual level under 8 rubrics,

which are: 1) Water Africa's attorneys letter dated 20 May 2015; 2) DPI Plastics' attorneys letter dated 26 May 2015; 3) Water Africa's attorneys letter dated 29 May 2015; 4) Supplementary Affidavit; 5) The Trust Account; 6) Evidence at Inquiry; 7) Water Africa's attorneys letter dated 19 October 2018; 8) The Mandate.

[10] A court of appeal would have to find that this court misdirected itself on the factual findings and would have to be convinced that this court was wrong on the facts, failing which there is a presumption that the conclusions are correct.⁴ If in doubt, it will uphold the factual findings of this court. The court of appeal would have to conclude on adequate grounds that this court was wrong on all 8 fronts. I do not see that as being likely when the commercial rationale for placing the funds with the attorneys is considered, as discussed above and in the judgment.

[11] In the decision of *Dexgroup (Pty) Ltd v Trustco Group International (Pty) Ltd and Others*⁵, Wallis JA observed that a court should not grant leave to appeal, and indeed is under a duty *not* to do so, where the threshold which warrants such leave, has not been cleared by an applicant in an application for leave to appeal. In paragraph [24] he held as follows:

“[24] [T]he court below was correct to dismiss the challenge to the arbitrator's award and the appeal must fail. I should however mention that the learned acting judge did not give any reasons for granting leave to appeal. This is unfortunate as it left us in the dark as to her reasons for thinking that enjoyed reasonable prospects of success. Clearly it did not. Although points of some interest in arbitration law have been canvassed in this judgment, they would have arisen on some other occasion and, as has been demonstrated, the appeal was bound to fail on the facts. **The need to obtain leave to appeal is a valuable tool in ensuring that scarce judicial resources are not spent on appeals that lack**

⁴ *R v Dhlumayo & Another*, 1948 (2) SA 677 (A) at pg 706

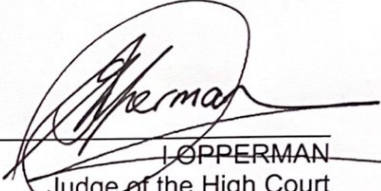
⁵ 2013 (6) SA 520 (SCA)

merit. It should in this case have been deployed by refusing leave to appeal."
(emphasis added)

[12] Nothing argued has persuaded me that another court might (old test) or would
(new test), find differently to what I found in the judgment, or to make a different order.

I therefore grant the following order:

The application for leave to appeal is dismissed with costs.


J. OPPERMAN
Judge of the High Court
Gauteng Local Division, Johannesburg

Counsel for the Applicants in the application for leave to appeal: Adv CD Roux
Instructed by: RC Christie Inc

Counsel for the Respondent in the application for leave to appeal: Adv P van der Berg SC
Instructed by: Van Veijeren Inc

Date of hearing : 1 March 2023
Date of Judgment: 6 March 2023