



**IN THE HIGH COURT OF SOUTH AFRICA
MPUMALANGA DIVISION, (MBOMBELA MAIN SEAT)**

Case No.: 5767/2023

DELETE WHICHEVER IS NOT APPLICABLE	
(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED YES/NO
<u>29 September 2025</u> DATE	 _____ SIGNATURE

In the application between:

WILLEM CONSTANTYN JANSON

APPLICANT

and

EBUNDU (PTY) LTD (in Business Rescue)
(Registration Number: 2016/195834/07)

FIRST RESPONDENT

PHAHLANI LINCOLN MKHOMBO N.O.

SECOND RESPONDENT

NTOMBIZODWA KATLEGO TSHABALALA

THIRD RESPONDENT

ALBERT SIBUSISO THSABALALA

FOURTH RESPONDENT

**THE COMPANIES AND INTELLECTUAL
PROPERTY COMMISSION**

FIFTH RESPONDENT

**INDUSTRIAL DEVELOPMENT CORPORATION
OF SOUTH AFRICA**

SIXTH RESPONDENT

**INTERESTED AND AFFECTED PARTIES
(LIST "A")**

SEVENTH RESPONDENT

JUDGMENT

FOURIE AJ

INTRODUCTION:

- [1] This application is an application for leave to appeal in terms of Rule 49(1)(b) of the Uniform Rules of Court.
- [2] The Applicant seeks leave to appeal to the Supreme Court of Appeal, alternatively to the full Court of this Division, against the portion of the Judgment, delivered by me on 30 April 2025, dealing with paragraphs 1 and 2 of the Orders (but not paragraph 3).
- [3] The Application for Leave to Appeal is opposed.
- [4] Although phrased under Rule 49 of the Uniform Rules of Court, Section 17(1) of the Superior Courts Act, 20 of 2013, finds application, and the Applicant has confined the Application for Leave to Appeal to Section 17(1)(a)(i) of the Superior Courts Act.
- [5] The argument raised by the Applicant is, accordingly, as I understand it, that reasonable prospects of success exist for the matter to be ultimately overturned on Appeal, rather than the existence of some or other compelling reason why the

appeal ought to be heard under the auspices of Section 17(2) of the Superior Courts Act.

[6] The Applicant has not, as is generally the norm, set out specific and numbered grounds of appeal, and an evaluation of the Application for Leave to Appeal seems to state rather in general terms the reasons why the Applicant is dissatisfied with the Order that was initially granted. Although certain paragraphs might resemble grounds of appeal, certain other paragraphs seem merely to expand upon the grounds of appeal, and it needs to be stated that the Notice of Application for Leave to Appeal as drawn by the Applicant seems to have been drawn as much with the grounds of appeal as with argument on why the grounds of appeal ought to succeed.

[7] As such, I do not intend to repeat the 32 paragraphs and subparagraphs that were stated by the Applicant in their Notice of Application for Leave to Appeal, and I trust the record shall reflect them correctly.

GROUND OF APPEAL:

[8] Insofar as I am able to do so, I summarise the grounds of the Applicant's appeal under the following sections:

[8.1.] No leave of the Court was necessary in line with Section 133(1) of the New Companies Act, 71 of 2008 and the Applicant ought to have partaken, as a right, within the processes under the auspices of Section 145(1)(b) of the Act.

[8.2.] In not declaring that the Applicant has a secured claim of R 8 000 000.00 (Eight million Rand) against Ebundu.

[8.3.] In not converting the business rescue proceedings to liquidation proceedings.

[9] As stated previously, many of the grounds of appeal are elaborated on in the Notice of Application for Leave to Appeal, but, insofar as I am able to do so, I trust the aforesaid sets out the main grounds on which the Applicant wishes to rely.

APPLICABLE LEGAL PRINCIPLES:

[10] The formulation for the test to be applied in applications for leave to appeal has been accepted and applied by our Courts in multiple judgments [1].

[11] In the matter of **JACOBS[2]** the full Court held as at paragraph 29 thereof that it seems that Section 17(1) of the Act construed as a whole is a qualification of the principles laid down in **Sweni v Minister of Law and Order of the Republic of South Africa[3]** assessed in the context of subsequent gloss afforded in decisions such as **S v Western Areas Ltd[4]** and **Philan-Ma-Afrika v Mailulu[5]**. In these decisions it was held that what is of paramount importance in deciding whether a judgment is appealable is the interest of justice.

[12] In the matter of **Caratco (Pty) Ltd v Independent Advisory (Pty) Ltd[6]** the Court stated that:

“If the Court is unpersuaded of the prospects of success, it must still enquire whether there is a compelling reason to entertain the appeal. A compelling reason includes any important question of law or a discreet issue of public importance that will have an effect on future disputes. But here too, the merits remain vitally important and are often decisive.”

[13] Post the amendment of the Act and the caselaw flowing thereafter, and for purposes of the current Judgment, it is deserving to merely restate that the position has significantly changed and it ought to be accepted that a general prospect of success or the belief that some or other Court might for some or other reason find differently than the Court *a quo* is not satisfactory for Leave to Appeal to be granted. Courts are unfortunately flooded with matters, and to unnecessarily proceed with matters with a view that a litigant might on a different day encounter a different Judge that might feel different and hold a different view on the case of a litigant is quite simply not enough. Leave to Appeal proceedings exist to weed out patent errors that occur when Judgments are handed down and to ensure that justice is ultimately done. Leave to Appeal ought not to be regarded as merely for the taking, especially where the matter might at first glance seem to be of a technical nature.

[14] It unfortunately occurs ever so often that litigants try to persuade the Court, when an Application for Leave to Appeal is heard, that the technical nature of a matter is deserving of a re-evaluation of the matter by a different Court, seemingly in an attempt to have the Judge who dealt with the matter initially doubt his Order, and in the hopes of phrasing their argument before a different Judge or Judges differently to find ultimate favour with them or simply to delay the inevitable finalisation of the matter.

[15] This Court is of the belief that Leave to Appeal ought to be reserved for when the Court is, with a degree of certainty, convinced that a different Court will come to a different conclusion in respect of the legal questions that have been posed by a litigant. Although I accept the bar ought not to be set unreasonably high, an order of this nature is not simply designed to cater for speculation.

[16] The aforesaid is crucial, specifically under circumstances where a litigant does not rely on the second portion of the Act, being the portion dealing with some or other compelling reason why Leave to Appeal ought to be granted. Under certain

circumstances, it might very well be important for an abstract legal principle or matters dealing with the general public interest to be tested on appeal in order for the legal position to be properly tested and captured.

[17] In the current matter, however, as stated previously, the Court is only requested to evaluate the matter under the auspice that a different Court will come to a different conclusion.

DISCUSSION ON GROUNDS FOR LEAVE TO APPEAL:

[18] At the hearing of the matter, the Court found it strange that, suddenly in the Application for Leave to Appeal, it was the case for the Applicant that it is the Court that acted in error when denying consent in terms of Section 133(1)(b) of the Companies Act, 71 of 2008 and the Applicant now suddenly states that such consent was not necessary for the matter to be brought to Court. This line of reasoning stands directly opposite to the argument advanced by the Applicant when the matter was initially argued. In the Court *a quo*, the Applicant at length relied and tried to persuade the Court on the applicability of Section 133(1)(b) of the stated Act, as well as to attempt to convince the Court why the relief in respect of the same ought to be granted.

[19] This Court need not take it any further than to evaluate the Applicant's own case in the Court *a quo* and the relevant provision of the Act.

[20] Section 133(1)(b) of the Companies Act, 71 of 2008 states as follows:

“133. (1) During business rescue proceedings, no legal proceeding, including enforcement action, against the company, or in relation to any property belonging to the company, or lawfully in its possession, may be commenced or proceeded with in any forum, except—

“(a).....

(b) with the leave of the court and in accordance with any terms the court considers suitable;

(c)

(d)

(e)”

[21] In their argument in respect of Leave to Appeal, the Applicant wishes to request the Court seemingly to have no regard to the relief that they sought in the initial application and the long line of previous matters dealing with similar questions such as the conversion of a Company in business rescue to the liquidation thereof, and counsel appearing on behalf of the Applicant indicated that the Applicant’s own reasoning when the matter was initially heard was seemingly incorrect and the correct position ought to have been that no relief in terms of Section 133(1) was necessary.

[22] When the Applicant initially brought the application, it was the Applicant who set the playing field and the case that the respective Respondents needed to answer. It is the Applicant that set the threshold the Applicant needed to meet, and, seemingly not reaching such a threshold in the Court *a quo* now during the appeal processes, seems to attempt to reason away the applicability of Section 133 of the Companies Act, 71 of 2008 in order to improve the Applicant’s position. If the threshold imposed by Section 133(1) of the Act is not taken into account, obviously, the case the Applicant needs to present in order to be ultimately successful becomes easier.

[23] This Court is not persuaded that Section 133(1) of the Companies Act, 71 of 2008, does not find application to the matter at hand, having regard to all the relief the Applicant ultimately sought. Similarly, this was not the case for the Applicant when the matter was proceeded with.

- [24] The question accordingly is whether the Court was incorrect, and a different Court will come to a different conclusion, having been faced with the matter that was presented to the Court initially. This Court is not persuaded on this point that it would.
- [25] On the question of whether or not the Applicant was regarded as a creditor or not, and whether the manner in which the Applicant was dealt with by the business rescue practitioner, ought to lead to the relief the Application sought when the matter was heard in the Court *a quo*, the argument presented by the Applicant during the application for leave to appeal again differed from the argument that was presented when the matter was heard in the Court *a quo*. Simply put, the argument advanced by the Applicant's legal representatives in the Court *a quo* and the argument advanced in the Application for Leave to Appeal were not the same.
- [26] The statements, argument, and concessions made by the Applicant's legal representatives when the matter was initially heard, in the Court *a quo* represent a factual position which the Applicant requested on that day the Court to make a finding on. Once the Court made a finding and ordered a Judgment based on what the Court was presented with, it cannot be open to the Applicant to then refine, readjust, and restate their case or even rephrase it in the hope that the rephrasing of their argument affords them a better opportunity before a different forum.
- [27] To retry and reargue a matter through different arguments, different nuances, and different statements in different forums would lead to an absolute absurdity. When the matter was initially heard, the Applicant could have and should have raised all the arguments that it wished the Court to take into regard, in order to either find for or against them. Applications for Leave to Appeal are not designed to afford any applicant the proverbial second bite of the apple.

[28] In as far as it relates to the Applicant's claim, the fact that the Applicant was regarded as a creditor, which is evident from Annexure "WJ9" to the Applicant's own application, the fact that the business rescue plan was adopted under circumstances where the Applicant had the right to participate in the proceedings and was thereafter bound to act in respect of the business rescue plan, which the Applicant in most circumstances failed to do, and irrespective of the argument raised during the Applicant's Application for Leave to Appeal fortifies the position that a different Court would not find differently were the facts presented to them.

[29] Insofar as it relates to the conversion of the company from business rescue to being finally wound-up and in the Court *a quo* the Applicant conceded that statutory compliance had not been met. This Court reiterates the position as per the Judgment in the Court *a quo* when it was stated that:

"The Court will not merely as a "fallback position" grant a provisional winding up order because the Applicant has failed to have its house in order when the application was heard initially. When a Court makes an order that affects the status of a company it affects the rights of all the affected persons of such a company also. In the current application, it would have had enormous ramifications on all affected parties if the Court extended its discretion in favour of the Applicant to uplift the moratorium, to recognise the Applicant's claim and to convert the business rescue process into that of liquidation. To do so under circumstances where the Applicant's house was not in order to ensure compliance with the Act would simply not make any sense. If the Applicant were to be afforded the right of a provisional winding up order to allow the Applicant to get its house in order in respect of statutory compliance when the non-compliance was neither addressed or applied to be condoned, it would not be proper. The ordering of a provisional order would not only have delayed the finalisation of the matter but would have adversely affected the rights of all the affected parties."

“I hold no doubt that a Court may under certain circumstances condone non-compliance with the statutory provision of Section 346(4A)(b) when the facts of the matter deserve such non-compliance to be condoned, under which circumstances it might then be appropriate for the Court to safeguard the interest of an Applicant by ordering the provisional winding up of a company whilst affording protection to affected parties ordering compliance with the Act before a final winding up order would be issued. This is however to be regarded as the exception to the rule and not the standard to be applied. When parties, such as in the current matter had more than a year to ensure that their papers were properly before Court and similarly had the same amount of time to ensure compliance with each and every aspect which would have been necessary to obtain the relief they seek, the Court cannot be expected to grant the application as a provisional order when their non-compliance is pointed out by the Court at the hearing of the matter.”

[30] The application was not brought as an urgent application; the application was brought over a prolonged period of time, and the Applicant had every opportunity to comply with the statutory obligations imposed on the Applicant. The Applicant failed to comply with the statutory obligations, conceded that they failed to comply with their statutory obligations, and, seemingly as an afterthought, requested the “fallback position” for an interim liquidation to be granted.

[31] I am not persuaded that a different Court will come to a different conclusion on this point, nor, having regard to the facts of the matter, that it is justified that the Court comes to the aid of the Applicant or that it would be in the best interest of the company for the Court to do so.

[32] Insofar as any of the other grounds for leave to appeal have not been expressly set out in this judgment, same have been evaluated under the headings that the Court has dealt with in this Judgment and for all the same reasons as the Court

has stated herein, the Court is not persuaded that the threshold for granting Leave to Appeal has been met.

CONCLUSION:

[33] Under these circumstances and for all the reasons I have stated herewith, I make the following Order:

[33.1.] The Application for Leave to Appeal is dismissed.

[33.2.] The Applicant shall pay the costs of the application on a party and party Scale B.



**H F FOURIE AJ
ACTING JUDGE OF HIGH COURT, MBOMBELA**

Applicant: : **JACO ROOS ATTORNEYS
C/O WDT ATTORNEYS**

First and
Second Respondents: :**RAMS ATTORNEYS
C/O DU TOIT SMUTS & PARTNERS**

Third and
Fourth Respondents:

**BARNARD INC ATTORNEYS
C/O VZLR ATTORNEYS**

Judgment reserved on: 18 July 2025
Date of delivery: 29 September 2025

- [1.] Four Wheel Drive Assessory Distributors CC v Rethan N.O. 2019 (3) SA 451 (SCA) at para 34; Pretoria Society of Advocates & Others v Nthai 2020 (1) 267 (LP) at para 5; Vrystaat Munisipale Pensioen Fonds v The Pension Funds Adjudicator 2019 JDR 0211 (FB) at para 4; Visagie N.O. v MTN Group Limited 2013 JDR 2853 (GSJ) at paragraph 3.
- [2.] Jacobs v Beacon Island Shareblock unreported (WCC Case Number A258/2018 dated 6 February 2019
- [3.] Sweni v Minister of Law & Order of the Republic of South Africa 1993 (1) SA 523 (A)
- [4.] S v Western Area Ltd 2005 (5) SA 214 (SAC)
- [5.] Philan-Ma-Afrika v Mailulu 2010 (2) SA 573 (SCA)
- [6.] Caratco (Pty) Ltd v Independent Advisory (Pty) Ltd 2020 (5) SA 35 (SCA) at paragraph 2