



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

CASE NO. 3642/2020

In the matter between

**COOGAL FINANCE (PTY) LTD [In Liquidation]
(Registration Number 2005/027362/07)**

1st APPLICANT

KAREN FONTEIN N.O

2nd APPLICANT

versus

**SUMEIL (PTY) LTD
(Registration Number 2013/146387/07)**

1st RESPONDENT

**MASTER OF THE FREE STATE
HIGH COURT, BLOEMFONTEIN
2021**

2nd RESPONDENT

JUDGMENT - APPLICATION FOR LEAVE TO APPEAL

CORAM: NAIDOO J

**HEARD ON: Heads of Argument submitted for Application to be
considered in Chambers**

DELIVERED ON: 17 MAY 2021

- [1] This is an application for leave to appeal only against the order of this court for the payment of money due by the applicant, which was the first respondent in the main application (Sumeil) to the first respondent, which was the first applicant in the main application (Coogal). For convenience I will refer to the applicant for leave to appeal in this matter as Sumeil and the first respondent as Coogal. By agreement with the parties, Heads of Argument were filed for consideration of the application by the court in Chambers, and without the need for oral arguments in court. Adv TP Kruger SC is on record for Coogal and Adv PJJ Zietsman SC is on record for Sumeil.
- [2] The Application for leave to appeal was filed out of the time prescribed in the Rules of Court. In this case Rule 49(1)(b) is applicable and provides that an application for leave to appeal must be brought within fifteen days of the judgment. An application for condonation for such late filing was brought. The attorney acting on behalf of Sumeil deposed to the Founding Affidavit in the condonation application, explaining that due to a misapprehension on his part regarding the time for filing the application for leave to appeal, the application was filed approximately five days out of time. The application for condonation was also filed late, and the explanation proffered for that was counsel's

unavailability to draw the papers timeously. The application for condonation was served on Coogal's attorneys on 6 December 2021, but they have not opposed it or reacted to it at all.

[3] Although it is expected of an attorney to be aware of or acquaint himself/herself with the relevant Rules of Court, it is accepted that it may well happen that an oversight, as in this case, does occur. Coogal received the application for condonation early in December and its lack of a response is taken to mean that it does not oppose the application. If condonation were to be refused, it would visit undue hardship upon Sumeil, in that it will not be able to have its application for leave to appeal heard. Coogal on the other, stands to suffer little prejudice if the hearing of this matter were to continue. For these reasons, it is my view that condonation should be granted.

[4] In this application, Sumeil seeks an order:

- 4.1 Granting it leave to appeal only against the judgment of this court, delivered on 26 August 2021, relating to the judgment and order in respect of Coogal's alternative claim for payment;
- 4.2 Directing that such appeal be heard by a Full Bench of this Division;
- 4.3 Directing that the costs of the application be costs in the appeal; and
- 4.4 Granting further and/or alternative relief.

[5] The judgment was assailed on a number of grounds which are, essence that the court erred:

5.1 In finding that:

5.1.1 Sumeil is indebted to Coogal in the amount of Nine Hundred and Forty Four Thousand Rand (R944 000.00), together with interest;

5.1.2 that there is no evidence that the payments made by the Maritz Nel Family Trust to Absa were made on behalf of Sumeil to discharge its indebtedness to Coogal;

5.1.3 that Sumeil's alleged indebtedness to Coogal was not disputed on *bona fide* and reasonable grounds;

5.2 In not finding that:

5.2.1 that the Plascon-Evans test was to be applied in this matter, namely that this matter should be decided on the version set out by Sumeil in the Answering Affidavit together with such allegations in the Founding Affidavit which are not disputed by Sumeil;

5.2.2 the general ledger under account 5500/004: Sumeil (Edms) Bpk reflects the loans to and from Sumeil, the customer ledger under account 006: Sumeil (Edms) Bpk reflects the master rental agreement transactions and the supplier ledger under account 008:Sumeil (Edms)Bpk reflect all the expenses that Sumeil paid on behalf of Coogal;

5.2.3 on 4 February 2019 the general ledger in the books of Coogal reflected a credit balance in respect of Sumeil in the amount of One Million Four Hundred and Twelve Thousand Nine Hundred and Six Rand and Eighty Three Cents (R1 412 906.83) and the customer ledger 006:

Sumeil (Edms) Bpk reflected a debit balance against Sumeil of One Hundred and Eighty Five Thousand Rand (R185 000.00);

5.2.4 on the deemed date of liquidation, namely 4 February 2019, Coogal owed Sumeil the amount of One Million Two Hundred and Twenty Seven Thousand Nine Hundred and Six Rand and Eighty Three Cents (R1 227 906.82).

5.3 in not dismissing Coogal's alternative claim for the payment of R944 000.00 together with costs of the application.

[6] The reasons for the order made in respect of Coogal's alternative claim for payment of amounts due to it are set out in the judgment. It is indicated in the judgment that there is no evidence to support the allegation that the amounts paid from the account of the Family Trust, were made on behalf of Sumeil. There is further more no indication other than Sumeil's assertion that these amounts were in respect of the balloon payments owed to Coogal. The possibility that these payments were in respect of other transactions cannot be ruled out. It is common cause that these payments were made two weeks after the deemed date of liquidation, hence the situation remains that the amount in respect of the balloon payments remained owing to Coogal as at that date. This was the basis of the court's order in this respect.

[7] With the advent of the Superior Courts Act 10 of 2013 (the Act), section 17 thereof now regulates the test to be applied in an application for leave to appeal. The relevant provisions of section 17(1) provide as follows:

“(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;” (my emphasis and underlining).

[8] Previously, an applicant was merely required to show that there is a reasonable possibility that another court, differently constituted, would find differently to the court against whose judgment leave to appeal is sought. It is clear from section 17(1), set out above, that the situation is now somewhat different, and an applicant for leave to appeal is required to convince the court that there is a reasonable prospect of success and not merely a possibility of success. In the matter of *The Mont Chevaux Trust v Tina Goosen + 18 2014 JDR LCC*, Bertelsmann J held that:

“It is clear that the threshold for granting leave to appeal against a judgment of a high court has been raised in the new Act. The former test whether leave to appeal should be granted was a reasonable prospect that another court might come to a different conclusion....The use of the word ‘would’ in the new statute indicates a measure of certainty that another court will differ from the court whose judgment is sought to be appealed against.”

[9] The Mont Chevaux decision was cited with approval in a number of

cases. See *Matoto v Free State Gambling and Liquor Authority* (4629/2015) [2017] ZAFSHC 80 (8 June 2017), *The Full Court in Acting National Director of Public Prosecutions and Others v Democratic Alliance* (19577/2009) [2016] ZAGPPHC 489 (24 June 2016) also cited Mont Cheveau with approval.

[10] For the reasons set out in the judgment and which I have mentioned above, I am of the view that Sumeil has not shown that it has reasonable prospects of success on appeal and that another court would come to a different conclusion to the one reached by this court.

[11] In the circumstances the following order is made

The application for leave to appeal is dismissed with costs

On behalf of the Applicants: Adv TP Kruger SC
Instructed by: Jaco Roos Attorneys Inc
c/o Noordmans Inc
1 Eighth Street
Arboretum
Bloemfontein
(Ref: Nr Roos/Gerrie/MAT383)

On behalf of the Respondent: Adv PJJ Zietsman
Instructed by: Kramer Weihmann Attorneys
KW Building, 24 Barnes Street
Westdene
Bloemfontein
(Ref: DB Muller/jvdw/TSJ635)