IN THE HIGH COURT OF SOUTH AFRICA,

FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**YES/NO**
Of Interest to other Judges:	**YES/NO**
Circulate to Magistrates:	**YES/NO**

Case No.: 2427/2021

In the matter between: -

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	Applicant

and

IQBAL MEER SHARMA	1st Defendant
NULANE INVESTMENTS 204 (PTY) LTD	2nd Defendant
ISLANDSITE INVESTMENTS 180 (PTY) LTD	3rd Defendant
KURT ROBERT KNOOP N.O.	4th Defendant
JOHAN LOUIS KLOPPER N.O.	5th Defendant
ISSAR GLOBAL LIMITED	1st Respondent
ISSAR CAPITAL (PTY) LTD	2nd Respondent
TARINA PATEL-SHARMA	3rd Respondent

CORAM: N. M. MBHELE, AJP

HEARD ON: 25 FEBRUARY 2022

DELIVERED ON: 28 APRIL 2022

This is an application for leave to appeal brought by the 3rd Defendant (Islandsite Investments 180 (Pty) Ltd) on a judgment delivered by Musi, JP.

[1] This is an application for leave to appeal against the judgment of Musi, JP that was delivered on 11 August 2021, in which the following order was made:

> "1. BDK Attorneys do not have authority to act on behalf of the third defendant in these proceedings.
> 2. The directors and or shareholders of the third defendant have no standing to oppose these proceedings without the approval of the Business Rescue Practitioners."

[2] The application for leave to appeal is sought on approximately 14 grounds. To avoid prolixity I shall not repeat same herein.

[3] Leave to appeal is governed by Section 17 of the Superior Courts Act 10 of 2013 (the Act). Subsection 17(1)(a) – (c) reads 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;
> *(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. "

[4] It is generally accepted that the existing provisions of the Act raise the standard to be met by an applicant in a leave to appeal. The test for granting leave to appeal is whether there are any reasonable prospects of success in an appeal. It is not whether a litigant has an arguable case or a mere possibility of success.[1]

[5] In **The Mont Chevaux Trust v Tina Goosen and 18 Others**[2] said the following:

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[1] Mothuloe Incorporated Attorneys v The Law Society of the Northern Province 2017 JDR 533 (SCA) at para 18

[2] Unreported judgment of the Land Claims Court of South Africa Case No LCC 14R/2014 delivered on 3 November 2014

> "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, see **Van Heerden v Cronwright & Others** 1985 (2) SA 342 (T) at 343H**.** The use of the word "would" in the said new statute indicates a measure of certainty that another court will differ from the court whose judgment is sought to be appealed against."

[6] It is clear from the above authorities that in leave to appeal applications a judge's discretion has to be exercised in conformity with section 17(1). The Act places a heavy onus on the applicant to show why another court would come to a different conclusion. It is no longer about the applicant having an arguable case, it must be clear at the time of granting leave to appeal that prospects of success are real and not fanciful.

[7] Musi, JP remarked as follows in **The School Governing Body Grey College, Bloemfontein v Deon Scheepers and Others**:[3]

> "Whether there is a compelling reason why the appeal should be heard will depend on the facts of a particular case. There must be a strong reason for granting leave to appeal on this ground. Some reasons may be compelling whilst others may not be. The Court should give careful and proper consideration to the reason advanced before categorizing it as compelling. Section 17(1)(a)(ii) should therefore not be invoked for flimsy reasons."

[8] The third defendant brought its application for leave to appeal in December 2021, more than 4 months from the date of the judgment. It is not clear on which date the application for leave to appeal was filed, all I could glean from the papers is that the application for leave to appeal was signed on 15 December 2021 while the affidavit in support of the application for condonation of the late filing of the application for leave to appeal was signed on 18 December 2021. In terms of Rule 49(1)(b) of the Uniform Rules, the third defendant had to file an application for leave to appeal within 15 court days from the date of the order.

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[3] The School Governing Body Grey College, Bloemfontein v Deon Scheepers and Others: Unreported Judgment of Bloemfontein High Court Case no 2612/ 2018 delivered on 17 January 2019.

[9] The explanation given by the third defendant for the delay can be summarised as follows:

(a) The uncertainty whether Musi, JP's judgment (the main judgment), although having the final effect, was appealable;

(b) It was only after the judgment of the **Constitutional Court in Shiva Uranium (Proprietary) Limited and Another v Mahomed Mahier Tayob and Others**[4] that it became clear firstly that the main judgment was incorrect and wrong in law and that leave to appeal should have been applied for, and therefore should be applied for. The **Tayob** judgment above was delivered on 9 November 2021 and the condonation application was filed after Saturday 18 December 2021.

[10] Mr. Hellens, on behalf of the third defendant, submitted that the interests of justice demand that condonation and leave to appeal be granted as the reason for lateness is not so poor and that the merits are so strong that this court should grant the application. He contended, further, that the issue to be determined on appeal is so important that it requires the Supreme Court of Appeal to provide clarity on the roles of Business Rescue Practitioners and the board of directors of a company under business rescue.

[11] In **Darries v Sheriff Magistrate Court, Wynberg and Another** [5] the following remarks were made:

> "Condonation of the non-observance of the rules of this court is not a mere formality. In all cases, some acceptable explanation, not only of, for example, the delay in noting the appeal, but also, where this is the case, any delay in seeking condonation, must be given. An appellant should whenever he realises that he has not complied with a rule of court apply for condonation as soon as possible. Nor should it simply be assumed that, where non-compliance was due entirely to the neglect of the appellants' attorney that condonation will be granted. In applications of this sort the applicants' prospects of success are in general an important though not decisive consideration. When application is made for condonation it is advisable that the petition should set forth briefly and succinctly such essential information as may enable the Court to assess the appellant's prospects of success. But appellant's prospect of success is but one of the factors relevant to the exercise of the court's discretion, unless the cumulative effect of the other relevant factors in the case is such as to render the application for condonation obviously

[4] CC/305/ 20[2021] ZACC 40

[5] Darries v Sheriff Magistrate's Court, Wynberg and Another [1998] ZASCA 18; 1998 (3) SA 34 (SCA) at 40H-41E.

> unworthy of consideration. Where non-observance of the Rules has been flagrant and gross an application for condonation should not be granted, whatever the prospects of success might be."

[12] It is well established that condonation is not to be had merely for the asking: a full, detailed and accurate account of the causes of the delay and their effects must be furnished so as to enable the Court to understand clearly the reasons and to assess the responsibility. It must be obvious that, if the non-compliance is time-related then the date, duration and extent of any obstacle on which reliance is placed must be spelled out.[6]

[13] Ms. Ragavan, the deponent of the third defendant's affidavit, fails to explain how she came to the realisation that the main judgment was appealable and that there was a need to apply for leave to appeal. It is, further, not clear why it became necessary for the third defendant to wait for the Constitutional Court decision in **Tayob** before the decision to appeal could be taken. There is, further, no explanation why the leave to appeal and condonation applications were lodged over 5 weeks after the Tayob judgment was delivered, the very judgment that is said to have been the Damascus moment for the third defendant.

[14] Prospects of success on merits cannot be the only determining factor when considering an application for condonation. The applicant in a condonation application must still explain to the court why there was flagrant disregard of the rules of court. The third defendant failed to give reasons why the rules of court could not be adhered to.

[15] Mr. Hellens contended that the directors of third defendant do not require the authority of the Business Rescue Practitioners (the practitioners) to litigate on behalf of the company as the process of litigation would require understanding of historical matters which the practitioners have no knowledge of. He finds support in the Supreme Court of Appeal judgment of **Tayob v Shiva uranium (Pty) Limited 2020 JDR 2672 SCA par. 25.**

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[6] Uitenhage Transitional Local Council v South African Revenue Service 2004 (1) SA 292 (SCA) para 6.

[15] Section 66(1) of the Companies Act 71 of 2008 provides as follows:

> "66. (1) The business and affairs of a company must be managed by or under the direction of its board, which has the authority to exercise all of the powers and perform any of the functions of the company, except to the extent that this Act or the company's Memorandum of Incorporation provides otherwise."

[16] Section 137(2) of the Act provides as follows:

> '(2) During a company's business rescue proceedings, each director of the company:
>
> (a) Must continue to exercise the functions of director subject to the authority of the practitioner.
>
> (b) Has a duty to the company to exercise any management functions within the company in accordance with the express instructions or directions of the practitioner to the extent that it is reasonable to do so.

Section 137(4):

> "If during a company's business rescue proceedings the board or one or more directors of the company purports to take any action on behalf of the company that requires the approval of the practitioner that action is void unless approved by the practitioner."

[17] In **Tayob v Shiva Uranium (Pty) Ltd**[7] the court remarked as follows in paragraphs 24 and 25:

> "[24] Section 140(1)*(a)* of the Act provides:
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> 'During a company's business rescue proceedings, the practitioner, in addition to any other powers and duties set out in this Chapter—
>
> *(a)* has full management control of the company in substitution for its board and pre-existing management.'
>
> The word 'management' is not defined in the Act. Consequently, it must be ascribed its ordinary meaning, that is, to be in charge of or to run a company, particularly on a day-to-day basis. To appoint a substitute practitioner (who will then be in full management control of the company) is rather a function of governance and approval thereof is not in my view a management function.

[7] Tayob v Shiva Uranium (Pty) Ltd [ZASCA] 162 delivered on 8 December 2020.

> [25] As I have said, the court a quo based its decision to dismiss the applicants' application essentially on the provisions of s 137(2)*(a)* of the Act. It provides that during a company's business rescue proceedings, each director of the company must continue to exercise the functions of a director, 'subject to the authority of the practitioner'.[8] Subsection 137(2)*(a)* must, of course, be read with the provisions of Chapter 6 of the Act and those of s 140 in particular. They circumscribe the ambit of the authority of the practitioner. Any function of a director that falls outside of that ambit, cannot be subject to the approval of the practitioner. It follows that s 137(2)*(a)* only affects the exercise of the functions of a director in respect of matters falling within the ambit of the authority of the practitioner. As I have shown, the appointment of a practitioner does not fall within the powers or authority of a practitioner."

[18] In **Tayob** the SCA found that the functions of directors that do not fall within the ambit of the authority of the practitioner do not require the practitioner's approval. It follows that the practitioner's authority is required on issues relating to the day to day management of the company.

[19] Litigating on behalf of a company is a risky exercise which is not only limited to legal costs, it extends to issues like reputational risk, brand damage and diversion of management resources. It is an exercise that cannot be embarked upon without the knowledge and authorisation of someone responsible for day to day management of the company's affairs.

[20] Mr. Hellens submitted that the third defendant was not insolvent when it was placed under business rescue. The decision to place it under business rescue followed the South African banks' decision not to extend its services to the third defendant. The decision by the banks casts a spotlight on the reputation and brand equity of the third defendant. It is clear that the decision to litigate has far reaching implications for a company under business rescue and that it requires authorisation of the practitioner whose responsibility is to rescue a company that is facing extinction. In the circumstances of the current matter the decision to litigate on behalf of the third defendant cannot be categorised as a governance issue that falls exclusively in the terrain of the directors.

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[21] Having considered the merits of the application for leave to appeal, I am not persuaded that there would be reasonable prospects of success on appeal.

CONCLUSION:

[22] Having concluded that none of the grounds of appeal enjoy reasonable prospects of success, whether taken singly or cumulatively, the application for leave to appeal must fail.

[23] I make the following order:

1. The application for leave to appeal is dismissed with costs.

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N.M. MBHELE, AJP

Appearances:

For the Applicant/3rd Defendant:	Adv. Hellens SC with Adv. Joubert Instructed by BDK Attorneys Bloemfontein
For the Respondent/Applicant:	Adv. G. Budlender SC with Adv. B. Somaru Instructed by NDPP Bloemfontein