

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

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

Date: **26th November 2021** Signature:

CASE NO: 18358/2020

DATE: 26TH NOVEMBER 2021

In the matter between:

EDUCATED RISK INVESTMENTS 54 (PTY) LIMITED

Applicant

and

THE MASTER OF THE HIGH COURT, JOHANNESBURG

First Respondent

POLLOCK, RICHARD KEAY N O

Second Respondent

SYKES, MARYNA ESTELLE N O

Third Respondent

KOTZE, OLGA N O

Fourth Respondent

[The second to fourth respondents are cited *nomine officio*

in their official capacities as the duly appointed joint liquidators of

FARM BOTHASFONTEIN (KYALAMI) (PTY) LIMITED (in liquidation)]

NEDBANK LIMITED

Fifth Respondent

IMPERIAL HOLDINGS LIMITED

Sixth Respondent

Coram: Adams J

Heard: 26 November 2021 – The ‘virtual hearing’ of the application was conducted as a videoconference on *Microsoft Teams*.

Delivered: 26 November 2021 – This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to *CaseLines* and by release to SAFLII. The date and time for hand-down is deemed to be 12:00 on 26 November 2020.

Summary: Application for leave to appeal against factual findings in opposed application court proceedings – s 17(1)(a)(i) of the Superior Courts Act 10 of 2013 – an appellant now faces a higher and a more stringent threshold – application for leave to appeal refused

ORDER

- (1) The applicant's application for leave to appeal is dismissed with costs.
- (2) The applicant shall pay the second to sixth respondents' costs of this application for leave to appeal, including the costs occasioned by the employment of two Counsel, where so employed.

JUDGMENT [APPLICATION FOR LEAVE TO APPEAL]

Adams J:

[1]. I shall refer to the parties as referred to in the original opposed application. The applicant is the applicant in this application for leave to appeal and the respondents herein were the second to sixth respondents in the original application. The applicant applies for leave to appeal against the whole of the judgment and the order, as well as the reasons therefor, which I granted on the 29th of September 2021, in terms of which I had dismissed, with costs, the applicant's main application as well as its other interlocutory applications.

[2]. The application for leave to appeal is against my factual and legal findings that the applicant in effect sought the re-opening of the second and

final liquidation and distribution account ('the second L & D Account') in respect of Farm Bothasfontein (In Liquidation) ('Farm Bothasfontein'), when the applicant in fact sought an order declaring invalid the Master's purported confirmation of the said account as well as ancillary declaratory orders. The applicant also contend that I erred in my factual finding that the second L & D Account had been duly confirmed by the Master on 1 June 2020 in terms of section 408 of the Companies Act, Act 61 of 1973 ('the Companies Act'), notwithstanding the facts which indicated that the peremptory legal requirements of the Companies Act, and in particular, sections 403 and 406 of the Companies Act had not been complied with, which precluded the first respondent from confirming, alternatively having the power to confirm the second L & D Account.

[3]. The applicant also appeals against my factual finding that the dispute relating to s 38 was settled and compromised between all of the interested parties, including Educated Risk, on 14 November 2018. The court *a quo*, so it was submitted on behalf of the applicant, should have had regard to the fact that the applicant had issued summons for the setting aside of the settlement reached between the parties in November 2018 and a rescission of the Court Orders making the settlement agreement orders of this Court.

[4]. Nothing new has been raised by the applicant in this application for leave to appeal. All of these issues were raised in the main application and I have dealt with some of them in my original judgment. It is not necessary to repeat those in full. Suffice to say that at the core of the main application is an issue – or more aptly put, a non-issue – which is long dead and buried. The applicant wishes to revive that issue, which, in my view, cannot and should not be revisited. Mr Botha, who appeared on behalf of the respondents, has also submitted that there are other reasons, not dealt with in my judgment, why leave to appeal should be refused. There may very well be merit in those contentions.

[5]. The traditional test in deciding whether leave to appeal should be granted was whether there is a reasonable prospect that another court may

come to a different conclusion to that reached by me in my judgment. This approach has now been codified in s 17(1)(a)(i) of the Superior Courts Act 10 of 2013, which came into operation on the 23rd of August 2013, and which provides 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'.

[6]. In *Mont Chevaux Trust v Tina Goosen*, LCC 14R/2014 (unreported), the Land Claims Court held (in an *obiter dictum*) that the wording of this subsection raised the bar of the test that now has to be applied to the merits of the proposed appeal before leave should be granted. I agree with that view, which has also now been endorsed by the SCA in an unreported judgment in *Notshokovu v S*, case no: 157/2015 [2016] ZASCA 112 (7 September 2016). In that matter the SCA remarked that an appellant now faces a higher and a more stringent threshold, in terms of the Superior Court Act 10 of 2013 compared to that under the provisions of the repealed Supreme Court Act 59 of 1959. The applicable legal principle as enunciated in *Mont Chevaux* has also now been endorsed by the Full Court of the Gauteng Division of the High Court in Pretoria in *Acting National Director of Public Prosecutions and Others v Democratic Alliance In Re: Democratic Alliance v Acting National Director of Public Prosecutions and Others* (19577/09) [2016] ZAGPPHC 489 (24 June 2016).

[7]. I am not persuaded that the issues raised by the applicant in its application for leave to appeal are issues in respect of which another court is likely to reach conclusions different to those reached by me. I am therefore of the view that there are no reasonable prospects of another court coming to different conclusions, be they on aspects of fact or law, to the ones reached by me. The appeal does not, in my judgment, have a reasonable prospect of success.

[8]. Leave to appeal should therefore be refused.

Order

In the circumstances the following order is made:

- (1) The applicant's application for leave to appeal is dismissed with costs.

- (2) The applicant shall pay the second to sixth respondents' costs of this application for leave to appeal, including the costs occasioned by the employment of two Counsel, where so employed.

L R ADAMS
Judge of the High Court
Gauteng Local Division, Johannesburg

HEARD ON:	26 th November 2021 – in a 'virtual hearing' during a videoconference on <i>Microsoft Teams</i> .
JUDGMENT DATE:	26 th November 2021 – judgment handed down electronically
FOR THE APPLICANT:	Advocate P F Louw SC, together with Advocate J W Steyn
INSTRUCTED BY:	Van Hulsteyns Attorneys, Sandton
FOR THE FIRST RESPONDENT:	No appearance
INSTRUCTED BY:	No appearance
FOR THE SECOND, THIRD AND FOURTH RESPONDENTS:	Advocate Johan E Smit
INSTRUCTED BY:	Reitz Attorneys, Johannesburg
FOR THE FIFTH RESPONDENT:	Advocate A C Botha SC, with Advocate E Kromhout
INSTRUCTED BY:	Lowndes Dlamini Attorneys, Sandton
FOR THE SIXTH RESPONDENT:	Advocate A C Botha SC, with Advocate E Kromhout
INSTRUCTED BY:	Tugendhaft Wapnick Banchetti Attorneys, Sandton