

**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

Case number: 37624/2019

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| 1. | REPORTABLE: NO |
| 2. | OF INTEREST TO OTHER JUDGES: NO |
| 3. | REVISED |

.....	10 August 2021
Signature	Date

In the matter between:

Griffin Steamworks (Pty) Limited

Applicant

and

Thrive Entrepreneurs (Pty) Limited

Respondent

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email. The date and time of hand down is deemed to be 10 August 2021.

JUDGMENT

Moosajee AJ:

- [1] This is an application for leave to appeal against the whole of the order and judgment delivered by me during December 2020.
- [2] Griffin Steamworks (Pty) Limited ("**Griffin**") contends that an appeal has reasonable prospects of success and that I erred in at least three respects.
- [3] It is now settled law that Section 17(1)(a)(i) of the Superior Courts Act, 2013 has raised the bar in applications for leave to appeal. A judge may now only grant leave to appeal if the judge is of the opinion that the appeal would (not may) have a reasonable prospect of success.
- [4] In the case of Acting National Director of Public Prosecutions & Others v Democratic Alliance¹ the Court cited Bertelsmann J as follows: "*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.*"

¹ (19577/09)[2016] ZAGPHC 489 (24 June 2016) para 25

- [5] This judgment has been followed on numerous occasions by our courts². The new heightened bar that one has to comply with in order to succeed with an application for leave to appeal, is based on sound reasons of public policy, namely to ensure that scarce judicial resources are not spent on appeals that lack merit³.
- [6] Griffin contends that I erred by failing to make a determination as to whether the respondent (“**Thrive**”) was unable to pay its debts as envisaged by Section 345(f) read with Section 345(1)(c) of the Companies Act, 1973 read with item 9 of Schedule 5 of the Companies Act, 2008.
- [7] Griffin argues that I failed to make a finding in terms of Section 345(1)(c). There is good reason why I did not make such a finding. Counsel for Griffin did not rely on Section 345(1)(c) when the matter was argued before me.
- [8] In paragraph 6 of the founding affidavit filed in this matter, the following is alleged: “*This is an application for the winding-up of the respondent on the basis that it is unable to pay its debts, as contemplated in section 344(f) read with section 345(1) of the Companies Act No 61 of 1973 ... and item 9 of Schedule 5 of the Companies Act 71 of 2008.*”
- [9] Further, in paragraphs 36 and 37 of the founding affidavit, the following allegations appear:
- “36. On 26 April 2019, the applicant's attorney of record being Stanley Mervyn Rothbart (Rothbart) of Rothbart Inc ... caused a letter in terms of section 345(1)(a)(i) of the Companies Act 61 of 1973 ... calling upon the respondent to remedy its breach to be delivered to the respondent.*
- 37. Notwithstanding demand, the respondent has failed to remedy its breach and make payment of the sum of R721 215.58 to the applicant.”*
- [10] There is no specific reference to Section 345(1)(c) of the Companies Act, 1973 in the founding affidavit and neither was this referred to in the applicant's heads of argument or during argument before me.
- [11] I therefore find that there is no merit to the suggestion that I had erred in not making a finding based on Section 345(1)(c) of the Companies Act, 1973.
- [12] Griffin also contends that I erred in failing to accept a supplementary affidavit on its behalf. It is common cause that an application for leave to file the supplementary affidavit was not filed and Thrive did not consent to the filing of such a supplementary affidavit. Griffin's counsel correctly, in my view, conceded that I had a discretion in regard to the acceptance of the supplementary affidavit. I do not believe that I exercised my discretion incorrectly, in circumstances where there was no application for leave to file the supplementary affidavit and no subsequent explanation for why such an application was not timeously filed. I am therefore of the view that there is no merit to the second

² Minister of Police v Manyoni (41499/2018)[2021] ZAGPJHC 84 (24 June 2021) paras 2 – 4; Fair-Trade Independent Tobacco Association v President of the Republic of South Africa & Another (21688/2020)[2020] ZAGPPHC 311 (24 July 2020) paras 4 - 6

³ Dexgroup (Pty) Limited v Trustco Group International (Pty) Ltd & Others 2013 (6) SA 520 SCA (para 24)

ground of appeal.

- [13] Griffin contends that I erred in finding that the Section 345(1)(a) letter was not served on Thrive.
- [14] In paragraph 36 of the founding affidavit, Griffin alleged that it's attorney caused the letter in terms of Section 345(1)(a) of the Companies Act, 1973 to be delivered to Thrive's registered address and the letter and proof of service was attached to the founding affidavit as annexure "FA9". The letter was attached to the founding affidavit as annexure "FA9", but proof of service was not attached.
- [15] Thrive denied the contents of paragraph 36 of the founding affidavit, in its answering affidavit.
- [16] Despite this, Griffon did not deal with the issue any further in the replying affidavit and did not take up the opportunity in reply to attach a proof of delivery of the letter.
- [17] In these circumstances, there is no merit to Griffin's contention that I erred in finding that the Section 345(1)(a) letter was not served on Thrive.
- [18] I do not believe that another court would come to a different conclusion on any of the issues underlying Griffon's application for leave to appeal.
- [19] In the circumstances, the application for leave to appeal falls to be dismissed and I make the following order:
- (a) The application for leave to appeal is dismissed.

MOOSAJEE AJ
Acting Judge of the High Court,
Johannesburg

DATE JUDGMENT DELIVERED: 10 AUGUST 2021

Appearances

For applicant: Advocate T Lipshitz

Instructed by:
Rothbart Inc