

REPUBLIC OF SOUTH AFRICA



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

Case No. 2023/051824

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: No
- (2) OF INTEREST TO OTHER JUDGES: No
- (3) REVISED. No

..... 28 November 2023
R SHEPSTONE

In the matter between:

DR LH LINDE & ASSOCIATES NO 131 INC

Applicant

and

NEDBANK LIMITED

First Respondent

FIRST RAND LIMITED

Second Respondent

MEDICROSS HEALTHCARE GROUP (PTY) LTD

Third Respondent

LEAVE TO APPEAL JUDGMENT

1. I will refer to the parties as in the main application.
2. Medicross applies to this Court for leave to appeal in terms of section 17(1)(a) of the Superior Courts Act 10 of 2013.

The main application

3. Linde & Associates entered into a trio of agreements with Medicross which included an administration agreement, a loan and financing agreement, and a cession of book debts.
4. Linde & Associates provided Medicross with powers of attorney to open and operate bank accounts on its behalf with Nedbank Limited (the First Respondent) and First Rand Limited (the Second Respondent). These powers of attorney were stated to be irrevocable and allowed Medicross full control over Linde & Associates' bank accounts, including the ability to "sweep" funds into the banking accounts of Medicross.
5. Linde & Associates later decided to cancel the administration agreement by providing a 30-day notice on 2 May 2023. Subsequently, on 30 May 2023, its board of directors resolved to revoke Medicross's power of attorney, effective from 1 June 2023. Linde & Associates sought to regain control over its bank accounts and end the practice of sweeping funds.
6. Medicross brought a counterapplication seeking an asset preservation and anti-dissipation interdict, based on the apprehension that Linde &

Associates would liquidate the medical practice to evade repayment of debts owed to Medicross. The case presented to the court revolved around whether the powers of attorney granted to Medicross could be revoked and whether Linde & Associates intended to liquidate to avoid its financial obligations to Medicross.

7. The court concluded that Linde & Associates was legally entitled to revoke the powers of attorney granted to Medicross as the powers of attorney were not given as security for the debts owed but were intended to facilitate payment to Medicross. Therefore, they were not irrevocable by nature.
8. The court postponed the determination of the remaining issues in the application to the ordinary motion roll.
9. The core legal principle underlying the court's decision is that a power of attorney, even if stated to be irrevocable, can be revoked unless it is "coupled with an interest" in the sense that it is given as security for a debt. The court relied on the jurisprudence that distinguishes between a true authority or power, which is a personal competency delegated to the agent, and a right, which can be owned or possessed. The court found that the powers of attorney in question were not given as security for the debts owed but were intended to facilitate payment to Medicross. Therefore, they did not grant Medicross an interest in the mandate that would render the mandate irrevocable. This principle is consistent with

the Roman-Dutch law tradition upon which South African common law is based, as well as the modern interpretation of such legal concepts in South African jurisprudence.

Leave to appeal

10. The test for leave to appeal is not controversial.
11. In terms section 17(1)(a) of the Act, leave **may only** be granted where the judge or judges concerned are of the opinion that:
 - 11.1. the appeal would have a reasonable prospect of success;
or
 - 11.2. there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration.
12. Importantly, a Judge hearing an application for leave to appeal is not called upon to decide if his or her decision was right or wrong.¹
13. In the matter of *Dexgroup (Pty)Ltd vs TrustCo Group International (Pty) Ltd and others*², Justice Wallis observed that a court should not grant leave to appeal and indeed is under a duty not to do so where the threshold which warrants such leave has not been cleared. In paragraph [24] the court held as follows: -

¹ *Altech Radio Holdings (Pty) Ltd v Aeonova360 Management Services (Pty) Ltd and Another* (2023/001585) [2023] ZAGPJHC 1082 (28 September 2023)

² 2013 (6) SA 520

*“Although points of some interest in arbitration law have been canvassed in this judgment, they would have arisen on some other occasion and has been demonstrated. The appeal was bound to fail on the facts. **The need to obtain leave to appeal is a valuable tool in ensuring that scarce judicial resources are not spent on appeals that lack merit.** It should in this case have been deployed by refusing leave to appeal.”*

14. There must be a compelling reason that warrants the attention of another court before leave to appeal ought to be granted. In *Four Wheel Drive Accessory Distributors v Ratton* N.O 2019 (3) SA 451 at [34] the SCA held as follows: -

*“There is a further principle that the Court a quo seems to have overlooked. **Leave to appeal should be granted only when there is a sound, rational basis for the conclusion that there are prospects of success on appeal.** In the light of its findings that the plaintiff failed to prove locus standi or the conclusion of the agreement, I do not think that there was a reasonable prospect of an appeal to this court succeeding or that there was a compelling reason to hear an appeal. In the result, the parties were put through the inconvenience and expense of an appeal without any merit.”*

Grounds

15. There were numerous grounds of appeal which were distilled to one question, namely this: Did the revocation of the power of attorney given by Linde & Associates to Medicross destroy the security held by Medicross - in the form of the cession of book debts?
16. Mr. Stockwell, who together with Mr. Posthumus appeared for Medicross, submitted that the revocation of the power of attorney (which caused Medicross to lose control over Linde & Associates' banking accounts) destroyed the security held by Medicross.
17. Mr. Stockwell submitted that the power of attorney granted by Linde & Associates to Medicross was part of the security it enjoyed to ensure payment of the book debts. He argued accordingly that the order granted by this court effectively destroyed the security that Medicross held.
18. Mr. van der Berg on behalf of Linde & Associates submitted that the cession of the book debts did not include control over the banking accounts.
19. I disagree that the loss of control over the banking accounts of Linde & Associates destroyed Medicross' security. What the court's judgment effectively did was to take away the facility or mechanism utilised by Medicross to exercise their rights in terms of the cession. It does not

follow that Medicross lost its rights arising from the deed of cession. Medicross is still entitled to enforce its rights flowing from the deed of cession, it must just find another mechanism of doing so.

20. I therefore conclude that the security in the form of the cession of book debts enjoyed by Medicross has not been destroyed by the revocation by Linde & Associates of the power of attorney – and the court’s judgment - and am thus of the opinion that an appeal will have no prospects of success.

Conclusion

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

R. SHEPSTONE

Acting Judge of the High Court
Gauteng Division, Johannesburg

Heard: 08 November 2023

Judgment: 28 November 2023

Appearances

For the Applicant: Adv R Stockwell SC

Adv I L Posthumus

Instructed by: Whalley and Van der Lith Attorneys

For the Third Respondent: Adv P Van der Berg SC

Instructed by:

TLI Inc Attorneys