

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA  
(GAUTENG DIVISION, JOHANNESBURG)

**Case No: 24877/2021**

DELETE WHICHEVER IS NOT APPLICABLE  
(1) REPORTABLE: YES / NO.  
(2) OF INTEREST TO OTHER JUDGES: YES / NO.  
(3) REVISED.

DATE:

SIGNATURE:

In the matter between:

**PHILIP HENRY ARNOLD**

Applicant

and

**EOH MANAGED SERVICES PS (PTY) LTD**

First Respondent

**MONICA COWEN N.O.**

Second Respondent

**ANKIA VAN JAARSVELD N.O.**

Third Respondent

**JEHAN MACKAY**

Fourth Respondent

**EBRAHIM ABOOBAKER LAHER**

Fifth Respondent

**MOKUNYO PATRICK MONYEKI**

Sixth Respondent

**GARTH SOLOMON MADELLA**

Seventh Respondent

**CHETTAN OTTAM**

Eighth Respondent

**MICHAEL FITZGERALD N.O.**

Ninth Respondent

**ADVOCATE MABASO N.O.**

Tenth Respondent

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**JUDGMENT**

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**TODD AJ**

- [1] This is an application for leave to appeal against a judgment that I handed down on 27 September 2022.
- [2] The Applicant seeks leave to appeal on the ground that an appeal would have a reasonable prospect of success as contemplated in section 17(1)(a)(i) of the Superior Courts Act. In assessing prospects of success I follow the approach described in *Ramakatsa and others v African National Congress and Another* [2021] ZA SCA 31 at para 10.
- [3] The focus of the application for leave to appeal was this court's findings of fact from which it concluded (at paragraph [81] of the judgment) that the July 2013 manipulated document was not fatal to the First Respondent's claim against Silver Touch. Mr Theron, who appeared for the Applicant in the application for leave to appeal, submitted that this court had erred in holding that the EOH MS financial statements clearly and consistently reflected EOH MS as the loan creditor. He further submitted that there were no grounds on the papers to find anything other than that EOH MS Mthombo was the relevant loan creditor, and that the Applicant's personal representation in 2017 that EOH MS was the loan creditor at that stage could carry no weight because the debt had by that time prescribed.
- [4] In those circumstances, Mr Theron submitted, the First Respondent could not have had *locus standi* to bring the conversion application and it followed that the order to that effect (converting the voluntary winding up of Silver Touch into a compulsory winding up) necessarily falls to be set aside. Mr Theron submitted that there were

reasonable prospects that another court would reach that conclusion, and consequently that leave to appeal should be granted.

- [5] Mr Blou, who appeared for the First Respondent, submitted that the relevant financial statements referred to by Mr Theron, read with the First Respondent's answering papers referring to them, did indeed support the conclusions that this court had reached, and that applying the *Plascon Evans* rule in motion proceedings there were no grounds on which to find that EOH MS Mthombo was in fact the creditor in respect of the relevant loan, and consequently that there were no reasonable prospects of another court finding differently in respect of the existence of the loan to EOH MS.
- [6] Even if this were not so, Mr Blou submitted, the Applicant's cause of action was not an appeal in which a different conclusion on the facts would necessarily result in the relief sought by the Applicant being granted. He pointed to the inherently discretionary nature of the case brought by the Applicant and the various authorities indicating that the court must consider the circumstances of the liquidation as they were before it at the time of the application.
- [7] I remain of the view that the factual conclusions underpinning the judgment were sound. More importantly, even if I were to accept that there are reasonable prospects of another court coming to a different conclusion on this point, it seems to me that there remain formidable obstacles to the Applicant in seeking to persuade that other court to exercise a discretion to set aside its previous order converting the winding up to a compulsory winding up. As pointed out in paragraph [42] of the judgment, referring to the legal principles summarized in the preceding paragraphs, relief of the kind sought by the Applicant is a matter of discretion and will ordinarily be granted in exceptional circumstances only or on good cause shown.
- [8] Even if there are indeed prospects that another court would differ with my conclusion on the facts regarding the loan, it seems to me that there is little prospect of a court exercising its discretion in favour of the Applicant when one has regard to the various considerations referred to by Mr Blou and summarized at paragraphs [49], [51], [52] and [53] of the judgment, and referred to in turn in paragraphs [89] to [91].
- [9] As a result, I am not satisfied that there is a reasonable prospect that another court would grant the Applicant the relief it seeks, and the application for leave to appeal should fail.

[10] The application for leave to appeal is dismissed with costs, including the costs of one senior counsel.

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**C Todd**

**Acting Judge of the High Court of South Africa**

For the Applicant: Adv. E Theron SC  
Instructed by: Adam Creswick Attorneys

For the First Respondent: Adv. J Blou SC  
Instructed by: Werksmans Attorneys

Hearing date: 31 January 2023  
Judgment delivered: 7 February 2023