

**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION PRETORIA**

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

14 April 2023

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DATE

Case Number: 53241/2021

JACOBUS PETRUS FOURIE N.O.
and two others

First Applicant

And

HJ BOSCH & SEUNS BELEGGINGS (PTY) LTD

Respondent

JUDGMENT

SC VIVIAN AJ

1. On 7 February 2023, I dismissed an application brought by the Applicants for the winding up of the Respondent. The Applicants now seek leave to appeal against that order. The Applicants are the liquidators of HJ Bosch & Seuns Motors (Pty) Ltd, which is a related company to the Respondent. For ease of

reference, I refer to the company in liquidation as “Motors” and to the Respondent as “Beleggings”.

2. In my view, the appeal would not have reasonable prospects of success and there is no other compelling reason why the appeal should be heard. Accordingly, the requirements of Section 17(1)(a) of the Superior Courts Act (Act 10 of 2013) have not been met and leave to appeal must be refused.
3. The factual background is set out in my judgment and I will not repeat it.

The test for leave to appeal

4. Section 17(1)(a) has been discussed in a number of judgments. Dlodlo JA recently summarised the law as follows:

“Turning the focus to the relevant provisions of the Superior Courts Act[5] (the SC Act), leave to appeal may only be granted where the judges concerned are of the opinion that the appeal would have a reasonable prospect of success or there are compelling reasons which exist why the appeal should be heard such as the interests of justice. This Court in Caratco, concerning the provisions of s 17(1)(a)(ii) of the SC Act pointed out that if the court is unpersuaded that there are prospects of success, it must still enquire into whether there is a compelling reason to entertain the appeal. Compelling reason would of course include an important question of law or a discreet issue of public importance that will have an effect on future disputes. However, this Court correctly added that ‘but here too the merits remain vitally important and are often decisive’. I am mindful of the decisions at high court level debating whether the use of the word ‘would’ as opposed to ‘could’ possibly means that the threshold for granting the appeal

has been raised. If a reasonable prospect of success is established, leave to appeal should be granted. Similarly, if there are some other compelling reasons why the appeal should be heard, leave to appeal should be granted. The test of reasonable prospects of success postulates a dispassionate decision based on the facts and the law that a court of appeal could reasonably arrive at a conclusion different to that of the trial court. In other words, the appellants in this matter need to convince this Court on proper grounds that they have prospects of success on appeal. Those prospects of success must not be remote, but there must exist a reasonable chance of succeeding. A sound rational basis for the conclusion that there are prospects of success must be shown to exist.”¹

[footnotes omitted]

5. Accordingly, I must consider whether based on the facts and the law a court of appeal could reasonably arrive at a conclusion different to the decision that I made.
6. The notice of application for leave to appeal trawls through almost every factual and legal finding in the judgment. However, Mr Lourens confined his argument to three issues.

The first issue

7. I held that the Applicants did not have standing to bring a winding up application. It also follows from this finding that the debt relied upon by the

¹ Ramakatsa and Others v African National Congress and Another (724/2019) [2021] ZASCA 31 (31 March 2021) at para 10

Applicants is *bona fide* disputed on reasonable grounds. The Applicants submit that a court of appeal could reasonably arrive at a conclusion.

8. The factual existence of the loan from Motors to Beleggings was not disputed. However, Beleggings relied on a written cession *in securitatem debiti* concluded before the date of liquidation of Motors in terms of which Motors ceded the loan to Beleggings as security for the contingent liability of Beleggings as surety for the debt of Motors to a bank.
9. The Applicants persist in the argument that I should have found that the cession was probably not signed before commencement of Motors' liquidation proceedings. In my view, there is no prospect that a court of appeal will find differently. If the Applicants believe that the cession is not authentic, they should institute action proceedings to recover the loan. This will allow the authenticity of the cession to be properly tested.
10. Mr Lourens submits that I erred in law in finding that, although the *dominium* in the debt remains with the liquidators, the liquidators cannot as part of administration of the insolvent estate collect the debt from the cessionary and then pay it back to the cessionary when it proves its claim.
11. Mr Lourens says that this finding undermines the *concursum creditorem*. His submission is that, as at the date of liquidation, the loan was an asset in the estate of Motors. The effect of my decision is, he submits, to divest Motors of an asset.
12. These submissions are predicated on the argument that the cession is conditional and only came into effect when Beleggings paid the bank. As this

was after the date of liquidation, the effect is to divest Motors of an asset that it held at the date of liquidation.

13. I held that this interpretation would be destructive of the purpose for which the cession was concluded. It would render the cession meaningless. The intention of the cession was plainly to give Beleggings security, particularly in the event that Motors was placed in liquidation. Accordingly, the cession took effect as soon as it was signed.
14. The essence of the security afforded by the cession to the cessionary is that the cedent cannot claim payment of the debt. Usually, the effect of a cession in *securitatem debiti* is that the cedent transfers the right of action against a third party to the cessionary. But where the debt being ceded is owed by the cessionary to the cedent, it cannot be that the right of action against the cessionary is transferred to the cessionary. The cessionary cannot sue itself because, as a general proposition, a person cannot be both a plaintiff and a defendant.
15. Accordingly, the security afforded by the cession must be something other than the transfer of the right of action. In my view, it is akin to a *pactum de non petendo*. What the parties to the cession sought to achieve was to remove the right to sue for recovery of the loan from the cedent for so long as the cessionary remained exposed in terms of the suretyship. This would not be effective unless it came into effect immediately on signature of the cession.
16. If, as Mr Lourens submits, the principle in **Millman**² applies equally to a cession of a debt owed by the cessionary to the cedent, then the security afforded by

² Millman NO v Twiggs and Another 1995 (3) SA 674 (A) at 677 H

such cession is negated. Ordinarily, where the debt ceded *in securitatem debiti* is owed by a third party, the administration of that debt by the liquidator or trustee does not undermine the security held by cessionary. The cessionary is a secured creditor to the extent of the debt. But where the debtor is also the cessionary, its security is in not being exposed to a claim for payment of the debt. This is undermined if the principle in **Millman** is applied.

17. Accordingly, I am of the view that, based on the facts and the law, there is no reasonable prospect that a court of appeal could arrive at a different conclusion on the first issue.

The Second Issue

18. The second issue relates to my finding that it has not been shown that Beleggings is unable to pay its debts as is required in terms of Section 345(1) (c) of the Companies Act (Act 71 of 2008).
19. The submissions in respect of this issue were first that the usual inference from that the loan has not been repaid is that the respondent company is unable to pay its debts. Accordingly, I should not have found that Beleggings is a company that pays its debts as and when they fall due. What I found (and indeed, what is not disputed) is that Beleggings had limited commercial creditors, but those creditors that it does have are paid when the debts fall due.
20. The loan is different. The reason why it has not been paid is that it is disputed. Even if a court of appeal were to find that I am wrong on the first issue, that

only means that Beleggings is wrong in saying that it is not obliged to pay the debt. The usual inference cannot be drawn on the facts.

21. Mr Lourens focussed his oral submissions on second submission which is based on the loan that Beleggings has procured against the security of a mortgage bond over its immovable property. The Applicants do not dispute that there is a loan and that Beleggings has used some of the proceeds of the loan to place money in trust with its attorney to cover the capital claim by the Applicants. But Mr Lourens submits that this is “*borrowing from Peter to pay Paul.*”
22. The argument turns on paragraph 16 of Ponnan JA’s judgment in **Dolphin Ridge**.³ Mr Lourens submitted that the effect of this paragraph is that the loan is evidence of the commercial insolvency of Beleggings. I disagree. Justice Ponnan was dealing with the question as to whether the Court could infer from the fact that the entity facing potential liquidation (in that case, a close corporation) had been able to procure a debt that it was commercially solvent. He held that this may very well be a demonstration of its creditworthiness, but it may demonstrate the converse when it amounts to “*borrowing from Peter to pay Paul.*” It all depends on the facts.
23. In **Dolphin Ridge**, the loan was procured from a fraternal company. Ponnan JA concluded that no inferences favourable to the close corporation could be drawn. The learned Judge had already shown in paragraph 15 that, on the facts of that matter, the close corporation’s monthly expenses exceeded its

³ Express Model Trading 289 CC v Dolphin Ridge Body Corporate 2015 (6) SA 224 (SCA)

monthly income and that it was unable to pay its debts when they fell due. He did not draw a negative inference from the loan. He drew no inference.

24. On the facts of this case, a loan was obtained from a company that is not a related company in terms of Section 2 of the Companies Act. The attorney for Beleggings is the controlling mind behind the investor. But that does not mean that the attorney would cause his company to advance monies to Beleggings if he did not believe that Beleggings would repay the monies. The investor took security to secure its position. It is in that context that I inferred that the attorney can be expected to have knowledge of the financial affairs of Beleggings.
25. Even if this is not evidence of commercial solvency, another court is unlikely to find that it can infer commercial insolvency from the fact that the attorney was prepared to cause his company to advance monies to Beleggings.
26. Mr Lourens points out that the investment has the result that there is an additional loan in the books of Beleggings. That is so, but there is no evidence to suggest that it needs to be repaid in the short term. In my view, this is improbable given the nature of the security held by the investor, namely a mortgage bond.
27. The onus is on the Applicants to show that Beleggings is unable to pay its debts. They have not discharged that onus. In my view, based on the facts and the law, there is no reasonable prospect that a court of appeal could arrive at a different conclusion on the second issue.

Third Issue

28. The third issue is whether I correctly exercised my narrow discretion to refuse the winding up order.
29. Mr Lourens does not contend that I failed to appreciate the nature of the discretion or applied it on wrong legal principles. But he contends that I erred in finding that the circumstances of the matter are special or unusual to the extent of sustaining the proper exercise of the narrow discretion. Accordingly, his argument is that another court may apply the discretion differently.
30. Even though the discretion is a narrow one, the principle that an appeal court will not readily interfere without a lower court's exercise of its discretion applies. As Willis JA explained in **Afgri**: “... *an appeal court will not interfere with a lower court's discretion unless that court was influenced by wrong principles or a misdirection of the facts or if that court reached a decision the result of which could not reasonably have been made by the court properly directing itself to all the relevant facts and principles.*”⁴
31. The reason why the SCA interfered in the exercise of the discretion in **Afgri** is that the lower court did not keep in mind the principle that where the applicant for winding up is a creditor, it has a right, *ex debito justitiae*, to a winding up order. “*The discretion of a court to refuse such order is a ‘very narrow one’ that is rarely exercised and in special or unusual circumstances only*”.⁵ I did keep this principle in mind as is clear from paragraph 53 of my judgment.

⁴ *Afgri Operations Limited v Hamba Fleet (Pty) Limited 2022 (1) SA 91 (SCA) at para 12*

⁵ *Afgri Operations, supra* at para 13

32. One of the reasons why I would have exercised my discretion to refuse a winding-up order even if the required grounds were present is the fact that Beleggings has a liquidated counterclaim that exceeds the loan. But for the liquidation, the two debts would have been extinguished set-off. The Applicants did not suggest in their application for leave to appeal that this is not a ground upon which I could judicially exercise my narrow discretion.
33. In my view, based on the facts and the law, there is no reasonable prospect that a court of appeal could interfere in the exercise of my discretion on the third issue.

Conclusion

34. Accordingly, the Applicants have not satisfied the requirement of showing that there is a reasonable prospect that a court of appeal would come to a different conclusion. The Applicants have not shown on proper grounds that they have prospects of success on appeal.
35. There are also no other compelling reasons why the appeal should be heard.

36. I accordingly make the following order:

36.1. The application for leave to appeal is dismissed with costs, including costs of two counsel where so engaged.

Vivian, AJ
Acting Judge of the Gauteng Division of the High Court of South Africa

APPEARANCES:

FOR THE APPLICANT: P Lourens, instructed by Tintingers Inc.

FOR THE THIRD RESPONDENT: SD Wagenaar SC and D Hewitt, instructed
by George Rautenbach Inc.