IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

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

DATE: **12 June 2023**

SIGNATURE:.....

Case No. 38383/2018

In the matter between:

CAWOOD, WERNER **FIRST APPLICANT**

THE RESCUE COMPANY (PTY) LTD **SECOND APPLICANT**

And

DANCO BOERDERY (PTY) LTD **RESPONDENT**

In Re:

DANCO BOERDERY (PTY) LTD **APPLICANT**

And

CAWOOD, WERNER **FIRST RESPONDENT**

BEER, JOHAN CHRISTIAAN **SECOND RESPONDENT**

THE RESCUE COMPANY (PTY) LTD **THIRD RESPONDENT**

Coram: Millar J

Heard on: 5 June 2023

Delivered: 12 June 2023 - This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to the *CaseLines* system of the GD and by release to SAFLII. The date and time for hand-down is deemed to be 09H00 on 12 June 2023.

Summary: Application for Leave to Appeal – no prospect another court would come to a different conclusion or other compelling reason why leave should be granted – application dismissed with punitive costs.

ORDER

It is Ordered:

[1] The application for leave to appeal is dismissed.

[2] The first and second applicants, jointly and severally, the one paying the other to be absolved, are ordered to pay the respondents costs of the application for leave to appeal on the scale as between attorney and own client.

JUDGMENT

MILLAR J

[1] This is an application for leave to appeal a judgment handed down on 8 May 2023, in which it was ordered that the first and third respondents in the main application, the applicants in this application, were ordered to pay to the applicant, the respondent in this application, *inter alia*, R595 958.95 together with interest and punitive costs.

[2] The application is brought on 21 separate grounds challenging almost every finding of fact and law made in the judgment. I do not regard it necessary to deal with each and every ground. They follow three themes:

[2.1] The first is that the consequences of the judgment would have an impact on the *"business rescue industry as a whole"* and that it would *"create an environment within which business rescue practitioners are exposed to backlash."*

[2.2] The second is that the court failed to follow the decision of the full court in *Commissioner of South African Revenue Services v Primrose Gold Mines (Pty) Ltd and Others*[1] (Primrose Gold Mines) and

[2.3] Lastly, that the first respondent had not conducted himself in a manner that was inconsistent with what is expected of a business rescue practitioner, particularly in regard to the way in which he had gone about billing for the work done, opening of a bank account without informing anyone and then using that bank account to make payment to a company that was not a creditor of the business.

[1] [2016] ZAGPPHC 737 (23 August 2016).

[3] The test for the granting of leave to appeal is set out in S 17(1) of the Superior Courts Act [2] :

> *"Leave to appeal may only be given where the judge or judges concerned are of the opinion that –*
>
> *(a) (i) the appeal would have a reasonable prospect of success; or*
>
> *(ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration."*

[4] However, it was also argued that even if I were to find that there was no reasonable prospect that another court would come to a different conclusion, the legal issues raised were of such importance that these merited the granting of leave to appeal to the Supreme Court of Appeal.

[5] It was held by the *Supreme Court of Appeal in Panamo Properties (Pty) Ltd and Another v Nel and Others NNO*[3] (Panamo Properties) that:

> *"[1] Business rescue proceedings under the Companies Act 71 of 2008 (the Act) are intended to 'provide for the efficient rescue and recovery of financially distressed companies, in a manner that balances the rights and interests of all stakeholders.' They contemplate the temporary supervision of the company and its business by a business rescue practitioner. During business rescue there is a temporary moratorium on the rights of claimants against the company and its affairs are restructured through the development of a business rescue plan aimed at it continuing in operation on a solvent basis or, if that is unattainable, leading to a better result for the company's creditors and shareholders than would otherwise be the case. These commendable goals are unfortunately being hampered because the statutory provisions*

[2] Act 10 of 2013

[3] 2015 (5) SA 63 (SCA) para 1.

> *governing business rescue are not always clearly drafted. Consequently, they have given rise to confusion as to their meaning and provided ample scope for litigious parties to exploit inconsistencies and advance technical arguments aimed at stultifying the business rescue process or securing advantages not contemplated by its broad purpose. This is such a case."* (my underlining)

[6] The present application concerns a specific company that was placed in business rescue and the conduct of a specific business rescue practitioner. It is to be expected that every business rescue practitioner would conduct themselves in a manner that best serves the purposes for which the company was placed in business rescue as set out in *Panamo Properties*. In the event that one or more business rescue practitioners have failed to acquit themselves in the manner that is expected of them, then that is a matter between them and those to whom they are accountable. The fact that unnamed other business rescue practitioners may have conducted themselves in a similar fashion and may find themselves having to answer for it, to my mind, founds no basis for the granting of leave to appeal.

[7] In the main judgment, I dealt at paragraphs [22] to [29] with the reasons why the reliance by the applicant on the judgment of the full court in the *Primrose Gold Mines* case, was distinguishable from the present case. Put simply, in *Primrose Gold Mines*, the notice terminating business rescue was filed timeously but the business rescuer sought thereafter to act as though it had not, in the present case, the filing of the notice was deliberately delayed despite the fact that as a matter of law, the business rescue had already come to an end. In the present matter, the business was "kept in business rescue" until after sufficient funds had been set aside for the practitioner to appropriate payment for his fees through an unconnected third party.

[8] It seems to me that simply because a legal argument which is advanced, whatever its merit, has not been litigated and pronounced upon through every

level of the judiciary, does not militate in favour of the granting of leave to appeal on its own.

[9] The final group of grounds upon which this application was predicated were an attempt by the first applicant to justify his conduct in keeping the business under business rescue. He then opened a separate bank account without informing the business, cashed in the business' investment – again, without informing anyone at the business and then ensured that payment of the investment would be into the separate bank account known only to. From this separate bank account, he then "paid himself" through the mechanism of the third respondent.

[10] An important feature of the conduct of the first respondent in this matter, is the fact, that at all material times from the time of the opening of the separate bank account to the delivery of the notice of termination of the business rescue, none of the persons who were in control of the business and operating the business (ostensibly under the authority of the first respondent) knew what he had done. They were presented with *a fait accompli.*

[11] I have considered the grounds upon which this application for leave to appeal has been brought and the arguments advanced by the parties. I have also considered the reasons for granting the orders of 8 May 2023 and am of the view that there is neither a reasonable prospect that another court would come to a different conclusion nor any arguable point of law which merits the granting of leave to appeal.

[12] I am of the view that the costs should follow the result. The reasons for the granting of a punitive costs order in the main application apply equally in this application and it is for this reason that I make the costs order that I do.

[13] In the circumstances, I make the following order:

[13.1] The application for leave to appeal is dismissed.

[13.2] The first and second applicants, jointly and severally, the one paying the other to be absolved, are ordered to pay the respondents costs of the application for leave to appeal on the scale as between attorney and own client.

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A MILLAR

JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

HEARD ON:	05 JUNE 2023
JUDGMENT DELIVERED ON:	12 JUNE 2023
COUNSEL FOR THE APPLICANT:	ADV. J MÖLLER
INSTRUCTED BY:	JACO VAN RENSBURG ATTORNEYS
REFERENCE:	MR. J VAN RENSBURG
COUNSEL FOR THE FIRST RESPONDENT:	ADV. L VAN DER MERWE
INSTRUCTED BY:	KOSTER ATTORNEYS
REFERENCE:	MR. J KOSTER