



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN**

Case no:

D9264/2018

In the matter between:

UTOPIA TRADE INVESTMENTS (PTY) LTD

APPLICANT

and

STONERIDGE INVESTMENTS (PTY) LTD

FIRST

RESPONDENT

MARK TAYLOR

SECOND

RESPONDENT

GERHARD NEL

THIRD

RESPONDENT

PENWEL THAMSANQA KAMANGO

FOURTH

RESPONDENT

GREGORY TAYLOR

FIFTH

RESPONDENT

This judgment was handed down electronically by circulation to the parties' representatives by email, and released to SAFLII. The date for hand down is deemed to be 27 January 2023(Friday) at 12:30.

ORDER

The application for leave to appeal is dismissed with costs.

JUDGMENT IN THE APPLICATION FOR LEAVE TO APPEAL

MATHENJWA AJ

[1] The Respondent, Utopia Trade Investments (Pty) Ltd, seeks leave to appeal the judgment and order of this court handed down on 30 August 2022. Leave is sought to appeal to the full court of the KwaZulu-Natal Division of the High Court.

[2] The main grounds for the leave to appeal are that the court erred in granting the application in terms of Uniform rule 41(4); erred in finding that the sale of business and loan agreements were not concluded in contravention of s 152(4) of the Companies Act 71 of 2008 (the Act); erred in finding that the settlement agreement was not tainted by the illegality of the sale of business and loan agreements; erred in finding that the facts of this case

was distinguishable from *Shabangu v Land and Agricultural Development Bank of South Africa*¹ on the basis that the invalidity of the sale of business and loan agreement were disputed in this case; and erred in finding that the respondents were effectively precluded from raising the defence that the settlement agreement is tainted by the illegality of the sale of business and loan agreement for the first time in opposition to the Uniform rule 41(4) application.

[3] The circumstances in which leave to appeal may be granted is set out in s 17(1) of the Superior Courts Act 10 of 2013, which provides that:

‘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;
- (b) the decision sought on appeal does not fall within the ambit of section 16(2)(a); and
- (c) where the decision sought to be appealed does not dispose of all the issues in the case, the appeal would lead to a just and prompt resolution of the real issues between the parties.’

[4] Leave to appeal is sought both in terms of s17(1)(a)(i) and (ii) of the Superior Courts Act. The Supreme Court of Appeal had

¹ *Shabangu v Land and Agricultural Development Bank of South Africa* [2019] ZACC 42; 2020 (1) SA 305 (CC); 2020 (1) BCLR 110 (CC).

the opportunity to consider what constitutes reasonable prospect of success in *S v Smith*,² where Plasket AJA held that:

‘What the test of reasonable prospects of success postulates is 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 order to succeed, therefore, the appellant must convince this court on proper grounds that he has prospects of success on appeal and that those prospects are not remote, but have a realistic chance of succeeding. More is required to be established than that there is a mere possibility of success, that the case is arguable on appeal or that the case cannot be categorised as hopeless. There must, in other words, be a sound, rational basis for the conclusion that there are prospects of success on appeal.’ (Footnotes omitted.)

It is trite that a mere averment that an issue is of public importance or that there is a compelling reason to grant leave to appeal does not limit the court’s discretion to refuse or grant leave to appeal. In this regard, in *Minister of Justice and Constitutional Development and others v Southern African Litigation Centre another*,³ it was held that:

‘That is not to say that merely because the High Court determines an issue of public importance it must grant leave to appeal. The merits of the appeal remain vitally important and will often be decisive.’

[5] The judgment that is the subject of this leave to appeal is divided into two parts. Part 1 deals with the contention that the

² *S v Smith* [2011] ZASCA 15; 2012 (1) SACR 567 (SCA) para 7.

³ *Minister of Justice and Constitutional Development and others v Southern Africa Litigation Centre and others* 2016 (3) SA 317 (SCA) para 24.

sale of business and loan agreement were concluded in contravention of s 152(4) of the Act. I pointed out in paragraph 12 of the judgment that the business rescue plan itself recorded that the respondent would take shares of the business with the intention of finding a buyer to recover its claim and costs. Part 2 of the judgment deals with the contention that the settlement agreement was tainted by the illegality of the sale of business and loan agreements. I pointed out in paragraph 13 of the judgment that the conventional principle that a subsequent agreement entered into between the same parties following upon an earlier invalid agreement constitutes a compromise is still part of our law, therefore, even if I were wrong in my conclusion that the sale of business did not contravene the provisions of the business rescue plan, the subsequent settlement agreement constituted a compromise.

[6] With regard to the submission that the court erred in finding that the facts of this case was distinguishable from *Shabangu* on the basis that the invalidity of the sale of business and loan agreement were disputed in this case, I cited *Shabangu v Land and Agricultural Development Bank of South Africa*, where Froneman J stated that that case dealt with the settlement of an admittedly undisputed invalid earlier loan agreement where there was no dispute between the parties that the original loan agreement was invalid, whereas in this matter, there was dispute about the validity of the original agreement. Finally, the

respondent submits that the court erred in finding that the respondents were effectively precluded from raising the defence that the settlement agreement is tainted by the illegality of the sale of business and loan agreements for the first time in opposition to the Uniform rule 41(4) application. There is no substance in this ground. There is no record anywhere in my judgment that I held that the respondents were exclusively precluded from raising the defence that the settlement agreement is tainted by the illegality of the sale of business and loan agreement for the first time in opposing rule 14(4) application.

[7] Mr *Ploos Van Amstel* for the respondents submitted in argument before this court that the business rescue plan does not expressly provide for the sale of business and the agreement of sale was not signed by the business rescue practitioner. Therefore, the argument went, the issues pertaining to the business rescue plan raised a question of law and is both grounds for prospects of success and compelling reasons. Mr *Alberts* for the applicant argued that it is not necessary for the sale of business to be expressly stated in the business rescue plan because the objective of business rescue in terms of s 128 (1)(b) of the Act is for rehabilitation of a company. The sale of the company, the argument went, was to rescue the business in line with the objectives of business rescue. Mr *Alberts* further argued that the business was sold by, and the sale of business was

implemented by three parties, that is the business rescue practitioner, the main shareholder and the purchaser.

[8] Section 128 (1)(b) of the Act defines business rescue as:

'... proceedings to facilitate the rehabilitation of a company that is financially distressed by providing for:-

...

iii) the development and implementation, if approved, of a plan to rescue the company, by restructuring its affairs, business, property, debt and other liabilities, and equity in a manner that maximises the likelihood of the company continuing in existence on a solvent basis or, if it is not possible for the company to so continue in existence, results in a better return for the company's creditors or shareholders than would result from the immediate liquidation of the company;'

To my mind nothing turns on the averment that the business rescue issue is a compelling reason for this court to grant leave to appeal. I am agreeable with the respondent's counsel that the sale of business facilitated rehabilitation of the company as per the objective of business rescue in terms of the Act.

[8] In my view, in an application where the business was sold for purposes of rehabilitating the business, and the business rescue plan does not explicitly provide for the sale nor prohibit the sale of business such as in this application, the chances of another court finding that the business was sold contrary to the business rescue plan and therefore contrary to the provision of the law are remote and not realistic.

[9] In my view, the test for leave to appeal has not been met and accordingly I make the following order:

The application for leave to appeal is dismissed with costs.

MATHENJWA AJ

Appearances:

For the Applicant: Adv Ploos Van Amstel

Instructed by: Morne Coetzee Attorneys
Durban

For the Respondent: Adv Alberts

Instructed by: Lister and Company
Durban

Date of hearing: 5 December 2022

Date of judgment: 27 January 2023 (electronically)