



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

CASE NO: 12601/23

In the matter of:

PATRICK JOHN VOLKAR N.O.

FIRST APPLICANT

(in his capacity as co-trustee of the Volkar
Recoverable Trust)

SANDRA ANN VOLKAR N.O.

SECOND APPLICANT

(in her capacity as co-trustee of the Volkar
Recoverable Trust)

SWISS SAFARI AND ECO TOURS (PTY) LTD

THIRD APPLICANT

(Registration Number: 1995/001321/07)

and

BIG SKY TRADING 219 CC

FIRST RESPONDENT

(IN BUSINESS RESCUE)

(Registration Number: 2002/079700/23)

KARUN NAIDOO N.O.

SECOND RESPONDENT

(in his capacity as Business Rescue Practitioner
of Big Sky Trading 219 CC)

ORDER

The following order is granted:

1. The application for leave to appeal is dismissed with costs, such costs to be on scale C and to include the costs of two counsel, where so employed.

JUDGMENT

PIETERSEN AJ:

[1] This is an application for leave to appeal against the whole of the judgment and order, which was handed down on 9 February 2024 under the above case number, in which I granted a reconsideration order against the rule *nisi* issued by this Court on 24 August 2023.

[2] The Applicants seek leave to appeal on the following grounds:

- a) The Court erred in finding that the failure to join the creditors is a fatal non-joinder; and
- b) The Court erred in finding that there were alternative remedies available to the Applicants.

[3] The Applicants further argue that there are compelling reasons to grant leave to appeal on the basis that there are conflicting judgments on the question of whether creditors must be joined to an application brought against a company in business rescue after the publication, but before adoption, of a business rescue plan. The Applicants also submit that the issue is of substantial importance, not only to the parties but also to the general public, legal practitioners and the industry in relation to the application of the relevant provisions of the Companies Act 71 of 2008 (the “Companies Act”) which involve an important question of law that requires legal certainty.

[4] In terms of section 17(1) of the Superior Courts Act 10 of 2013 leave to appeal may only be given where the judge concerned is of the opinion that the appeal would have a reasonable prospect of success or if there is some other compelling reason why the appeal should be heard. Prior to the coming into effect of the Superior Courts Act 10 of 2013 the test to be applied in an application for leave to appeal was whether there were reasonable prospects that another court may come to a different conclusion¹. However, the position has changed in that section 17(1)(a)(i) provides for leave to appeal to be given only where the judge is of the opinion that the appeal would have a reasonable prospect of success.

[5] The Supreme Court of Appeal held in *S v Smith*² that the test is now stringent, and an appellant faces a higher and more stringent threshold, in terms of the Superior Courts Act compared to the provisions of the repealed Supreme Court Act 59 of 1959. Plasket JA held that 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. He held that there must be a sound and rational basis for the conclusion that there are prospects of success on appeal. This finding in *S v Smith* was again more recently confirmed by the Supreme Court of Appeal in *Four Wheel Drive Accessory Distributors CC v Rattan N.O.*³.

[6] In *Mont Chevaux Trust v Tim Goosen and 18 Others*⁴ Bertelsman J also held that the threshold for granting leave to appeal has been raised in the new Act. He found that the use of the word “would” in the new statute indicates a measure of certainty that another court will differ from the court whose judgment is sought to be appealed against.

¹ Section 20 of the Supreme Court Act 59 of 1959 and *Commissioner of Inland Revenue v Tuc* 1989 (4) SA 888 (T).

² 2012 (1) SACR 567 (SCA).

³ 2019 (3) SA 451 (SCA).

⁴ 2014 JDR 2325 (LCC).

[7] In terms of the first ground of appeal the First and Second Applicants (the “Applicants”)⁵ submitted that the court erred in finding that the non-joinder of the First Respondent’s creditors was fatal to the application and that, on this basis alone, the rule *nisi* must be discharged.

[8] The Applicants submitted that the court erred in following the judgment of *Industrial Development Corporation of South Africa Limited v Van Der Steen N.O. and Others* [2018] ZAGPJHC70 (“*IDC*”) as the court’s reasoning in *IDC* was obiter and based on precedents where the published business rescue plans had been adopted and creditors had secured substantive rights under those plans.

[9] In addition, the Applicants rely on the judgment in *Hlumisa Investment Holdings (RF) Limited v Van Der Merwe N.O.* 2015 JDR 2231 (GP) (“*Hlumisa*”) where it was held that the grievance by an affected person that a meeting had to be interdicted and postponed for proper consultation to take place and information provided, was not of interest to other affected persons and their joinder was not necessary. The Applicants also relied on the judgments in *Cooper N.O. and Others v Knoop N.O and Others* [unreported High Court, Johannesburg case no. 43452/2019, dated 26 September 2020] (“*Cooper*”) and *Blue Nightingale Trading 709 (Pty) Ltd v Nkwe Platinum South Africa (Pty) Ltd (in business rescue) and Others* [unreported High Court, Johannesburg case no. 28760/21, dated 18 August 2018] (“*Blue Nightingale*”) where the courts found that the right to vote on a business rescue plan is a statutory right of a procedural nature to participate in a process and which requires only notice to, and not joinder, of creditors.

[10] The relevant principles pertaining to joinder of interested parties are set out in paragraphs 34 to 39 of my judgment. It has been held in *Absa Bank Ltd v Naude N.O. and Others*⁶ that the test whether there has been non-joinder is whether a party has a

⁵ The Third Applicant has since been placed under provisional winding-up and its provisional liquidators delivered a notice to abide.

⁶ 2016 (6) SA 540 (SCA).

direct and substantial interest in the subject matter of the litigation which may prejudice the party that has not been joined.

[11] It therefore needs to be considered whether the relief sought in this matter may prejudice the rights of any creditors that have not been joined. I agree with Mr Potgieter SC, who appeared for the Respondents together with Mr Van Der Walt, that one should commence by considering the exact relief sought and then consider the impact on parties and decide whether the joinder of parties is necessary or merely convenient. There is also merit in the submission of Mr Stais SC, who appeared for the Applicants together with Ms Acker, that the authorities relied on by the court in *IDC* dealt with a situation where a business plan had already been adopted. However, the facts in *IDC* are substantially similar to the present matter and I agree with the reasoning of Meyer J (as he then was) in *IDC*.

[12] In *Hlumisa* the relief sought was to interdict a meeting pending the delivery of certain documents and information and an application to be launched within thirty (30) days for, *inter alia*, the setting aside of the business rescue proceedings. At paragraph 14 of the judgment the court referred to the nature of the relief sought where it considered the non-joinder issue. The court concluded that the Applicant's grievance, being the lack of consultation and the possible loss of their investment, and the relief sought, to postpone a meeting, to be consulted and to be provided with information, is not of interest to the parties not joined.

[13] *Hlumisa* can, therefore, be distinguished from the present matter as the relief sought in this matter seeks the indefinite postponement of the section 151 meeting pending recognition of the Applicants' claims in specified amounts by an unknown and an unspecified party. The effect of the relief in the present matter on creditors is profound and vastly more prejudicial to creditors than in *Hlumisa*. The relief sought in *Hlumisa* will not affect the voting rights of other creditors for an indefinite period whereas the voting rights as reflected in the BR Plan in the present matter would be

directly affected. This constitutes a direct and substantial interest in the matter to all creditors.

[14] In *Cooper*, Keightley J also considered the issue of non-joinder and held that in the circumstances of that matter it was not necessary to join all creditors. However, the facts can be distinguished from the present matter as the relief sought was to direct the First to Fifth Respondents to withdraw the publication of the revised business rescue plan, alternatively, that the decision by the BRP's to publish the plan is reviewed and set aside as well as further alternative relief. Keightley J held that where the relief sought is simply to delay the exercise of the vote, this would not ordinarily require the formal joinder of all creditors. It is clear from the judgment in *Cooper* that Keightley J did not go to the extent of finding that creditors need only to be joined after the acceptance of the business rescue plan. This is also apparent from the judgment by Keightley J in *Blue Nightingale* which concerned an application in terms of Section 130 of the Companies Act to set aside a business rescue resolution. The court held at paragraph 26 that it may be that there will be cases where, because of the particular facts involved, common law joinder of creditors is necessitated prior to the adoption of a business rescue plan. The learned judge then proceeds to deal with the judgment of Opperman J in *EBM Project (Pty) Ltd (in business rescue) and Another v Barak Fund SPC Limited* [unreported judgment of the Gauteng division Johannesburg, under case no. 18884/21 (14 June 2021)] ("*EBM Project*"). In *EBM Project* Opperman J concluded that it was necessary to give notice to affected persons/creditors as these persons have a real and substantial interest in the outcome of the proceedings before her.

[15] The Applicants further submitted that the alternative remedies dealt with under paragraphs 42 to 50 of the judgment do not constitute adequate alternative remedies in the circumstances. The Applicants submitted that the review procedure provided for in the business rescue plan are only available to creditors once the business rescue plan is adopted. However, it is at the behest of the Applicants that the section 151 meeting cannot proceed where the business rescue plan can be adopted. As a result,

if the business rescue plan is adopted at the section 151 meeting an alternative remedy in the form of review is available to persons in the position of the Applicants.

[16] The Applicants further submitted that it is not an answer to find that they ought to have exercised their rights in terms of section 152(1)(d) of the Act by attending the meeting and bringing a motion to amend the proposed plan in order to provide for the full extent of their claims. However, the Applicants do not explain on what basis they exercised this remedy at the first section 151 meeting held on 11 July 2023.

[17] The Applicants for the first time in the application for leave to appeal complain that the business rescue practitioner failed to consult with them and to explain the reduction of their voting interest and failed to provide a lawful notice of the meeting that informed the Applicants of their right to participate in and vote at the meeting. This issue was not raised by the Applicants in their papers or in argument before me at the hearing. In the circumstances, the issue was not properly raised and will not be considered for the first time in an application for leave to appeal.

[18] The Applicants further submitted that the proposed remedy that they must apply to court to set aside the resolution in terms of section 130(1)(a)(ii) of the Companies Act is not available to a creditor post adoption of the business rescue plan. In support of this argument the Applicants rely on the wording of section 130(1) of the Companies Act which provides that an affected person may apply to court to set aside the resolution to commence business rescue proceedings at any time after the adoption of the resolution but only “until the adoption of a business rescue plan”.

[19] With reference to the authorities referred to in paragraphs 48 and 49 of the judgment, it is clear that the alternative remedy under section 130(1)(a)(ii) to apply to set aside the resolution to commence business rescue on the basis that there is no reasonable prospect of rescuing the company, as the plan was not validly adopted in circumstances where the plan was approved on the strength of affected persons

exercising voting interests which they did not have, remains an adequate remedy in the circumstances.

[20] As a result, I am unable to find that an appeal would have a reasonable prospect of success. I am also unable to find that there are conflicting judgments and issues of substantial importance that require leave to appeal to be granted. The judgments relied on by the Applicants can be distinguished, as set out above.

Order

[21] The following order is made:

1. The application for leave to appeal is dismissed with costs, such costs to be on scale C and to include the costs of two counsel, where so employed.

PIETERSEN AJ

Date of hearing: 24 April 2024

Date of Judgment: 24 April 2024

APPEARANCES

Applicants in Application for leave to appeal: Adv P Stais SC
Ms L Acker

Respondents in the application for leave to appeal:

Adv AE Potgieter SC

Adv CG van der Walt SC