IN THE HIGH COURT OF SOUTH AFRICA

NORTHWEST DIVISION, MAHIKENG

CASE NO: UM29/2023

Reportable:	YES / **NO**
Circulate to Judges:	YES / **NO**
Circulate to Magistrates:	YES / **NO**
Circulate to Regional Magistra	YES / **NO**

11/06/2024

DATE [redacted]TURE

In the application for leave to appeal between:

TARIOMIX (PTY) LTD t/a FOREVER DIAMONDS AND GOLD (Registration Number: 2011/119889/07) (In liquidation)	Applicant
and	
RUAN BOTES	First Respondent
JEANDRE VILJOEN	Second Respondent
ELSABE SNYMAN	Third Respondent
RHEENEN BRAYSHAW	Fourth Respondent

RENIER BLOEM	Fifth Respondent
DANIEL VAN DER VYFER	Sixth Respondent
HENDRIK MYNHARDT	Seventh Respondent
NATASHA RACK	Eighth Respondent
KARIN DE BRUIN	Ninth Respondent
JAN LUBBE	Tenth Respondent
DEAN MYNHARDT	Eleventh Respondent
HERCULES DE LANGE	Twelfth Respondent
ANITA DU PLESSIS	Thirteenth Respondent
FINANCIAL SECTOR CONDUCT AUTHORITY	Fourteenth Respondent
HERMANUS JOHANNES VAUGHN VICTOR N.O.	Fifteenth Respondent
JOHANNA NINI MAHANYELE N.O.	Sixteenth Respondent
CAROLINE MMAKGOKOLO N.O. (In their capacities as the duly appointed joint provisional liquidators of TARIOMIX (PTY) LTD (in liquidation)	Seventeenth Respondent
SOUTH AFRICAN REVENUE SERVICES	Eighteenth Respondent
MASTER OF THE HIGH COURT, MMABATHO	Nineteenth Respondent

Heard and Ex Tempore Order Given on: 29 May 2024

Reasons Requested: NO

Reasons Given on: 11 June 2024

These reasons were circulated electronically to the parties' representatives via email. The date and time of delivery of these reasons are deemed to be 10:00 am on Tuesday, 11 June 2023.

JUDGE'S REASONS

MORGAN, AJ

[1] On 29 May 2024 I handed down an order *ex tempore* in the application for leave to appeal the judgment and order I handed down in this matter. At the date of penning these reasons, the parties had not written to the Court requesting reasons for my order. Nevertheless, I find it prudent to furnish reasons for the order I have given.

[2] I heard this matter virtually on Microsoft Teams.

[3] This is an opposed application for leave to appeal by Tariomix (Pty) Ltd trading as Forever Diamonds and Gold ('the Applicant') against the judgment and order granted by this Court on 12 April 2024. Leave to appeal is sought in terms of section 17(1) of the Superior Courts Act 10 of 2013.

[4] The section 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."

[5] For the sake of ease and completeness, this Court ordered as follows:

"The application is dismissed with party and party costs on Scale C in terms of Rule 69 as amended, which costs shall include the costs of two counsel where so employed."

[6] As evident, I dismissed the application. These are thus the reasons.

THE ORDER ON WHICH LEAVE IS BEING SOUGHT

[7] On 12 April 2024, I made the following order:

"[85] In the circumstances I make the following order:

"1. The intervention applications by the intervening Applicants Elsabe Snyman and ten others as cited above is granted.

2. The notice of withdrawal filed by the First and Second Applicants is defective and accordingly dismissed.

3. The unopposed application by the South African Revenue Services to file a supplementary affidavit is granted.

4. The provisional order placing Tariomix (Pty) Ltd with Registration number 2011/119689/07 (in liquidation) on 23 February 2023 is made final.

5. Tariomix (Pty) Ltd be and is hereby placed under final winding-up.

6. The date of commencement of the winding-up of Tariomix (Pty) Ltd by the Court in terms of section 348 of the Companies Act, 61 of 1973, shall be deemed to be as from 20 February 2023.

7. The costs of the application will be costs in the liquidation and may be recovered on attorney and client scale.

8. Tariomix (Pty) Ltd's costs occasioned with the opposition of the application is disallowed and will not be the costs in the liquidation."

[8] This is the order against which the application for leave to appeal is sought.

GROUNDS OF APPEAL

[9] To not do carnage and cause injustice to the Applicant's arguments, I reproduce the grounds of appeal advanced by the Applicant in their entirety here:

a. "The Court erred in holding as it did in paragraph 82 of the judgment, that the withdrawal of the application by the original applicants was defective in that such withdrawal was not accompanied by a tender to pay the costs of the other parties. Rule 41(1)(a) provides in terms that a person who wishes to withdraw proceedings whilst being obliged to deliver a notice of withdrawal may embody in such notice of withdrawal a consent to pay costs. There is no obligation to incorporate such a consent in the notice of withdrawal. Rule 41(1)(c) further provides for the default position where no such consent to pay costs is incorporated into the notice of withdrawal, namely that the other party may apply to Court on notice for an order for costs.

b. The finding in paragraph 83 of the judgment, namely that the other parties have not filed a notice of consent to the withdrawal and merely made arguments about the effects of withdrawal is erroneous, more especially having regard to the contents of the notice of withdrawal and the documents attached thereto which unequivocally demonstrate that Tariomix and its board had consented to the withdrawal. The Financial Sector Conduct Authority ('*FSCA*') was not a necessary party to the application, and in any event no relief was sought against it in the application, in addition to which it never participated in the proceedings. Rule 41 does not, in terms, or by necessary implication prescribe any particular form which a party may consent to the withdrawal of proceedings.

c. The Court correctly found as was stated in paragraph 34 of the judgment, that the original applicants (Botes and Viljoen) had *'elected to withdraw their application'* (for the winding-up of Tariomix).

d. The Court erred in not finding that having regard to the withdrawal of the original winding-up application with effect from 19, alternatively 20 July 2023, which was consented to by Tariomix, it was not possible to confirm the Rule Nisi originally granted on 23 February 2023.

e. The Court erred in not applying the well-established practice in matters of this kind, as was summarised by Coetzee J (as he then was) in ***Fullard v Fullard*** [1].

f. The Court erred in particular by not applying the second principle which was formulated by Coetzee J in the following terms:

> '(2) Waar die applikant nie voortgaan nie kan die bestaande sekwestrasiebevel nie bekragtig word op aandrang van enige tussenbeide-tredende skuldeiser nie. Dit moet opgehef word en 'n vars bevel kan uitgereik word met die skuldeiser as applikant en nie as mede-applikant nie. Hy alleen word dus *dominus litis* en die oorspronklike applikant val heeltemal weg verder vorentoe.'
>
> Apart from this the intervening creditor must make out a case for sequestration (or liquidation in the case of company) and must put up security as if he/it was the original applicant, but he/it may rely upon facts which appear from the papers in the proceedings [2].
>
> The facts in this case are that the withdrawal of the original application took place on or about 19th or 20th July 2023, and the applications for leave to intervene were lodged from 11 August 2023 to 20 October 2023. There was therefore a considerable timelapse between these events with the result that it cannot be found that the *concursus creditorum* established by the provisional liquidation order granted on 23 February 2023 continued or was intended to continue as happened in ***Nel and Others NNO v The Master and Others*** [3].

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[1] 1979 (1) SA 368 (T) at 371D – 372E, *Nel and Others N.N.O v The Master and Others* 2000 (2) SA 728 (W) at 731J – 732B.

[2] *Fullard* at 372A.

[3] 2002 (3) SA 354 (SCA) para 8 at 362C – 363D.

g. That the Court erred in holding as it did in paragraph 40, read with paragraph 42 of the judgment that in the case of a company (as opposed to a natural person whose estate has been sequestrated) its estate is placed and vested in the hands of the Master. In the case of the winding-up of a company its assets do not vest in the Master [4].

h. That the Court erred in holding, as was done in paragraphs 60 to 62, read with paragraph 2 of the judgment, that on the return date of the Rule Nisi, the essential question *was 'whether the Company place under provincial liquidation* [Tariomix in this case] *and/or any other interested party has shown cause why the provisional order should not be made final'*. This finding is in conflict with well-established authority. In ***Wackrill v Southern International Removals (Pty) Ltd and Others***[5] the Court was concerned with the confirmation of a Rule Nisi and provisional winding-up order in respect of a company on the return date of a Rule Nisi. Margo J held with regard to the onus resting upon an applicant in winding-up proceedings as follows:

> 'On the other hand, as indicated in the *Pakistan Bus Service* case supra, the Legislature could not have intended that the requirements of s 347(1) of the Companies Act would be satisfied in respect of a final winding-up order by the adduction of evidence sufficient only to prove a mere *prima facie* case. Ordinarily the consequences of a final winding-up order are drastic indeed, and it could not have been intended that proof of all the allegations necessary for such an order should be anything less than that required generally in civil cases, that is proof on a clear balance of probabilities, with the admission of *viva*

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[4] *De Villiers and Others N.N.O. v Electronic Media Network (Pty) Ltd* 1991 (2) SA 180 (W) at 184C – D; *Fey N.O. v Lala Govan Exporters (Pty) Ltd; Fey N.O. v Allimpex CC; Faye N.O. v Govan* 2006 JDR 0715 (W) para 21.

[5] 1984 (1) SA 282 (W).

voce evidence where that may be necessary, to resolve material disputes on the affidavits. That also appears to be the standard of proof required for a final sequestration order in terms of s 12 of the Insolvency Act 24 of 1936, according to which, the Court must be *'satisfied'* that the petitioning creditor has established the elements of the case.' [6]

The approach followed in ***Wackrill*** was approved by Corbett JA (as he then was) in ***Kalil v Decotex (Pty) Ltd and Another*** [7], although that matter concerned the granting of a provisional winding-up order where the quantum of proof required is *prima facie*.

i. Although the order sought by the intervening parties and the provisional liquidators of Tariomix and granted affects the status and fundamental rights of the Company, inter alia as entrenched in terms of ss 25 and 34, as read with s 8(2) of the Constitution, as well as the rule of law itself, there was no justification for departing from the well-established practice in liquidation matters (as was done in paragraphs 66 to 79 of the judgment), namely that where an applicant withdraws an application in which a provisional winding-up order has been granted, and more intervening parties wish to persist with the winding-up proceedings, the proper procedure is that the provisional winding-up order is discharged, and a fresh provisional liquidation order is granted with the issuing of a Rule Nisi returnable on a specific future date.

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[6] At 285G – 286A *Paarwater v South Sahara Investments (Pty) Limited* [2005] JOL 13832 (SCA); [2005] 4 All SA 185 (SCA), para 2; *Export Harness Supplies (Pty) Ltd v Pasdec Automotive Technologies (Pty) Ltd* [2005] JOL 14056 (SCA); [2005] JDR 0304 (SCA), para [4]; *Orestisolve (Pty) Ltd t/a Essa Investments v NDFT Investments Holdings (Pty) Ltd and Another* 2015 (4) SA 449 (WCC), paras 8 and 9.

[7] 1988 (4) SA 943 (A) at 976A – 979C.

The practice of granting provisional winding-up orders together with a Rule Nisi ought to be followed. It appears that Practice Directive 16 of the North West Division, by implication provides that in this Division applications for the winding-up of companies follow the practice whereby final winding-up orders are preceded by the granting of provisional winding-up orders [8].

j. That the only appropriate orders in the circumstances which ought to have been granted by the learned Presiding Judge were these:
    i. that the Rule Nisi be discharged (with no further order); alternatively
    ii. that the Rule Nisi be discharged and that a fresh provisional liquidation order be granted coupled with a Rule Nisi in the usual form with a specific return date at the instance of a specific intervening party or specific intervening parties, who would be obliged to provide security in terms of the provisions of s 346(3) of the old Companies Act."

[10] This was not all. The Applicant further added the additional grounds in its supplementary leave to appeal:

k. "In this regard the Learned Judge erred in its premise at par [61-62] that the mere existence of the provisional order creates an onus, alternatively an evidentiary burden, upon the company or another interested party to show that the interim order should not be made final.

l. Moreover, the Learned Judge erred in not holding that, in order to obtain a final order of liquidation, an Applicant bears an onus on a balance of probabilities to make out a case for liquidation on the grounds set out in the Companies Act 61 of 1973.

[8] *Johnson v Hirotec* 2000 (4) SA 930 (SCA) para 9.

m. The Court erred in not considering the founding papers, and only having regard to the *'submissions made by [the first respondent] and others on the return date'*."

[11] As alluded to earlier, this application of leave to appeal was opposed.

STATUTORY FRAMEWORK FOR GOVERNING LEAVE TO APPEAL

[12] Section 17(1)(a) of the Superior Courts Act reads:

> "17. (1) 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."

[13] In considering the import of this section, the Supreme Court of Appeal in ***MEC for Health, Eastern Cape v Mkhitha and Another*** stated that leave to appeal should only be granted if there is a genuine reasonable prospect of success. Section 17(1)(a) of the Superior Courts Act, 10 of 2013, stipulates that leave to appeal may be given only if the Judge in question believes the appeal has a reasonable prospect of success or there is another compelling reason for it to be heard.[9]

[14] An applicant seeking leave to appeal must demonstrate to the Court, with proper grounds, that there is a reasonable prospect or realistic chance of success on appeal. Simply showing a possibility of success, presenting an arguable case, or proving that the case is not hopeless is insufficient. There

[9] ***MEC for Health, Eastern Cape v Mkhitha and Another*** [2016] ZASCA 176 at para 16.

must be a sound and rational basis to conclude that there is a reasonable prospect of success on appeal.[10]

[15] In a similar vein, the Supreme Court of Appeal in ***Smith v S*** held, in relation to what constitutes "reasonable prospects of success" in terms of section 17(1)(a)(i) pf the Superior Courts Act, 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 than there are prospects of success on appeal."

[16] It is also trite that the Superior Courts Act, in terms of section 17, has evidently raised the threshold for granting leave to appeal against a High Court judgment. The use of the word "would" in the statute suggests a higher degree of certainty that another court will disagree with the judgment being appealed.[11]

[17] In ***S v Kruger***, the Supreme Court of Appeal articulated the significance of the word 'would' and the normative weight it brings. The Court there said:

> "Before dealing with the merits of the appeal, it is necessary at the outset to deal with the test applied by the high court in granting leave

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[10] Ibid at para 17.

[11] See ***The Mont Chevaux Trust (IT2012/28) v Tina Goosen & 18 Others*** 2014 JDR 2325 (LCC).

to appeal to this court. Despite dismissing the appellant's appeal, the high court concluded that it was 'possible' that another court might arrive at a different conclusion and that leave to appeal should not be 'lightly refused' where the person concerned is facing a lengthy sentence of imprisonment. This is an incorrect test. *What has to be considered in deciding whether leave to appeal should be granted is whether there is a reasonable prospect of success. And in that regard more is required than the mere 'possibility' that another court might arrive at a different conclusion, no matter how severe the sentence that the applicant is facing.*

...

The time of this court is valuable and should be used to hear appeals that are truly deserving of its attention. It is in the interests of the administration of justice that the test set out above should be scrupulously followed."[12] (My own emphasis).

[18] Reasonable prospects of success are a necessary factor to consider but not the only the determinative factor to take into account when considering an application for leave to appeal. Additional special circumstances are required. These may include the appeal raising a substantial point of law, the prospects of success being so strong that refusing leave to appeal, would result in a manifest denial of justice, or the matter being of significant importance to the parties or the public.[13]

[19] The test is not whether another court might possibly reach a different conclusion but whether there is a reasonable prospect that another court

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[12] ***S v Kruger*** 2014 (1) SACR 647 (SCA) at paras 2-3.

[13] ***Cook v Morrisson and Another*** 2019 (5) SA 51 (SCA) at para 8. See also ***Westinghouse Brake & Equipment (Pty) Ltd v Bilger Engineering (Pty) Ltd 1986 (2) SA 555 (A) at 564H – 565E; Director of Public Prosecutions, Gauteng Division, Pretoria v Moabi*** 2017 (2) SACR 384 (SCA) ([2017] ZASCA 85) at para 21.

would reach a different conclusion. Additionally, it is well-established that an applicant seeking leave to appeal must convince the court that there are reasonable prospects of success on appeal. Appeals should be restricted to cases where there is a reasonable prospect that the factual matrix might be interpreted differently or where there is a legitimate legal dispute. The case law database is replete with such *dicta*, which is trite and well-established.

[20] I now turn to analyse the grounds of appeal.

ANALYSIS OF THE FACTS OF THE CASE

[21] ***Uys and Another v Du Plessis (Ferreira intervening)*** makes it clear that an intervening creditor may be granted permission to intervene at any point, whether to contest sequestration or to have a *rule nisi* set aside.[14]

[22] The Intervening Parties were entitled to be granted permission to intervene in the main liquidation application. They are among the many unpaid creditors of Tariomix, venture partners in the joint venture agreements with Tariomix, and investors of working capital into Tariomix's trade and business in accordance with the joint venture agreement made with Tariomix and/or its representatives.[15]

[23] In exercising its discretionary powers, this Court recognised the *sui generis* nature of liquidation proceedings and the role that courts play in liquidation proceedings. It also took into account the following events and evidence:

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[14] See ***Uys and Another v Du Plessis (Ferreira intervening)*** 2001 (3) SA 250 (C) at 252 and ***Fullard v Fullard*** 1979 (1) SA 368 (T) at 371 F to 372 G.

[15] ***Shapiro v SA Recording Rights Association Limited (Galeta Intervening)*** [2006] JOL 17036 (W) at paras 8-20.

a. Curator's Report (June 1, 2023): This report recommended that Tariomix be wound up definitively.
b. Provisional Liquidators' Fourth Report: This report confirmed Tariomix's factual and commercial insolvency.
c. Bertelsman Interim Report: This report concluded that the "joint venture agreement" lacked legal merit and was not a legitimate agreement. It further stated that Tariomix operated as a fraudulent scheme and was insolvent from its inception.
d. Payments by Intervening Parties: The Intervening Parties, whether considered creditors or "Joint Venture Partners" by Tariomix, made payments to Tariomix (including payments to Forever Zircon on Tariomix's instruction).
e. Tariomix's Lack of Response: Tariomix failed to adequately address the allegations from the Intervening Parties and the reports mentioned above.
f. Absence of Genuine Dispute: There was no real disagreement about the facts presented to the Court. Tariomix's reliance on any such dispute is baseless and legally unsound.
g. In so far as the missing transaction records refer, the Court found that there is no record linking specific diamonds or diamond packets to corresponding investments in Tariomix's financial records. Further that no connection could be established between deposits and profitable diamond sales, as confirmed by the transcript of Mr. van der Westhuizen, as stated the liquidators' report, and Bertelsman interim report.
h. In relation to Tariomix's Non-Disclosure, this Court found that Tariomix completely failed or refused to provide evidence of its financial health; or offer any plausible justification for why a final liquidation order should not be granted. Its sole argument rested on the withdrawal of the original application.

[24] The sole avenue remaining for Tariomix to challenge this Court's Order lies in establishing before an appellate court that this Court demonstrably failed to exercise its discretion judicially in applying the relevant law to the factual matrix presented. Notably, the Notice of Appeal filed by Tariomix does not

raise any such ground. This, in itself, suggests a dispositive conclusion to the matter.

[25] The established standard for re-examining a lower court's exercise of discretion is well-settled. As elucidated by Khampepe J in the landmark decision of ***Trencon Construction (Pty) Limited v Industrial Development Corporation of South Africa Limited and Another***, an appellate court will generally defer to a lower court's proper exercise of discretion. However, this deference is not absolute. Intervention may be warranted in limited circumstances, such as:

a. Where the lower court demonstrably failed to exercise its discretion judicially.
b. Where the lower court applied erroneous legal principles or demonstrably misinterpreted the factual record.
c. Where the decision reached by the lower court is so manifestly unreasonable that no court properly directing itself on the law and facts could have arrived at such a conclusion.[16]

[26] It is trite that an appellate court should not simply substitute its own judgment for that of the lower court based on mere disagreement with the chosen course of action.

[27] Justice Moseneke, in ***Florence v Government of the Republic of South Africa***, further bolstered this principle. When a court is entrusted with broad discretionary authority, resulting in a range of potential decisions, an appellate court will only intervene if the chosen option is demonstrably inconsistent with the established legal framework. As long as the lower court's decision falls within the spectrum of permissible choices, mere preference for an alternative outcome by the appellate court does not justify intervention. This principle of "appellate deference" serves to promote comity within the judicial system,

[16] ***Trencon Construction (Pty) Limited v Industrial Development Corporation of South Africa Limited and Another*** 2015 (5) SA 245 (CC) at paras 88–89.

fosters predictability in the application of law, and safeguards the finality of judicial pronouncements.[17]

[28] In the main judgment at paragraphs 35 to 47, I elaborated on the issue of the original applicants withdrawal found that the notice of withdrawal and the withdrawal of the application by the original applicants does not affect the liquidation proceedings after this Court has made a provisional order placing the company under liquidation. In my view, the Applicant in the application for leave to appeal has not purged this finding. Only the court has the power to discharge a company under provisional liquidation. No case has been provided by the Applicant to contradict this very point.

[29] Having regard to the above, I am of the view that no other court would come to a different conclusion. Therefore, I cannot find any basis that there are reasonable prospects of success and that another court would come to a different conclusion. Ergo, the application for leave to appeal is dismissed.

[30] It is for the aforementioned reasons that I granted the order in paragraph 5 above.

[redacted]

MORGAN AJ

[redacted]

[17] ***Florence v Government of the Republic of South Africa*** 2014 (6) SA 456 (CC) at para 113.

PARTIES REPRESENTATIVES

For the Applicant/ Respondent in the Main Application	1st :	Advocate PJ Louw SC with C J Hartzenberg SC and Advocate I Ferreira Instructed by: WN Attorneys Incorporated
For 1ST and 2ND Respondents / 1st & 2nd Applicants in the Main Application	:	Advocate D.R. Du Toit Instructed by: Hansen Incorporated Attorneys
For the 3rd, 6th, 10th & 12th Respondents / The 7th to 10th Intervening Parties in the Main Application	:	Advocate F.W. Botes, SC with Advocate J. Stroebel. Instructed by: Barnard & Patel Incorporated
For the 13TH Respondent / 11th Intervening Party in The Main Application	:	Advocate M. Louw Instructed by: Mathys Krog Attorneys
For the 4TH, 5TH, 7TH, 8TH, 9TH & 11TH Respondents / The 1ST to 6TH Intervening Parties in the Main Application	:	Advocate A.S.L. van Wyk with Advocate D Broodryk Instructed by: Rabie Botha & Associates Inc
For the 15th To 17th Respondents 3RD to 5TH Respondents in The Main Application	:	Advocate J. Hershensohn SC with Advocate R. De Leeuw Instructed by: Strydom Rabie Incorporated
For The 18th Respondent / 6TH Respondent in the Main Application	:	Advocate M. Meyer with Advocate M Molea Instructed by: Mathopo Moshimane Mulangaphuma Incorporated t/a DM5 Incorporated
For the Master of the High Court, Mmabatho	:	No appearance