IN THE HIGH COURT OF SOUTH AFRICA,

FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**NO**
Of Interest to other Judges:	**NO**
Circulate to Magistrates:	**NO**

Case No.: 1580/2020

In the matter between: -

THERESA VAN DER MERWE 1st Applicant

NEO DISEKO 2nd Applicant

REMAINING AFFECTED PERSONS 3rd Applicant

and

IKAGENG ELECTRICAL CONTRACTORS (PTY) LTD 1st Respondent

VOLTEX (PTY) LIMITED t/a LIGHTING STRUCTURES

AND ATLAS GROUP 2nd Respondent

AND

Case No.: 2247/2019

In the matter between: -

VOLTEX (PTY) LTD t/a LIGHTING STRUCTURES

AND ATLAS GROUP Applicant

and

IKAGENG ELECTRICAL CONTRACTORS (PTY) LTD Respondent

JUDGMENT BY: C. J. MUSI, JP

HEARD ON: 24 MARCH 2021

DELIVERED ON: 22 APRIL 2021

[1] This is an application for leave to appeal against my judgment delivered on 24 December 2020, wherein I dismissed, with costs, an application to place the first respondent (Ikageng) under business rescue and granted an application that it wound-up.

[2] The application for leave to appeal is based on numerous grounds. I pause to set out the requirements for an application for leave to appeal before dealing with the merits of this application.

[3] Section 17(1) of the Superior Courts Act[1] regulates applications for leave to appeal. It reads as follows:

> "(1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that—
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> (a)(i) the appeal would have a reasonable prospect of success; or
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> (ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;
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> (b) the decision sought on appeal does not fall within the ambit of section 16(2)(a); and
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> (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] This application was predicated upon sections 17(1)(a)(i). Section 17(1)(a)(i) has not only raised the bar for applications for leave to appeal but also fettered the Judge's discretion when considering such applications. Leave to appeal may only be granted when the Judge or Judges are of the opinion that the appeal would have a reasonable prospect of success. The word "only" is indicative of the fact that this section limits the Judge's discretion to grant leave to appeal. The Judge's discretion is circumscribed because he or she may not grant leave to appeal based on a reason other than the one mentioned in it.

[1] Superior Courts Act No 10 of 2013.

Considerations such as an applicant for leave to appeal, having an arguable case or that there is a possibility of success on appeal are irrelevant.[2]

[5] It has correctly been said that the word "would" in the section points to the legislature's aim of raising the bar in applications for leave to appeal. In **The Mont Chevaux Trust v Tina Goosen and 18 Others**[3] it was stated that:

> "It is clear that the threshold for granting leave to appeal against a judgment of a High Court has been raised in the new Act. The former test whether leave to appeal should be granted was a reasonable prospect that another court might come to a different conclusion… The use of the word "would" in the new statute indicates a measure of certainty that another court will differ from the court which judgment is sought to be appealed against."[4]

[6] I now turn to consider the different grounds of appeal. The first and second applicants (applicants) contend that I erred in ordering them to pay Voltex and ABSA's costs. I pointed out in the main judgment that the business rescue application was contrived to delay Ikageng's winding up and an abuse of this Court's process. They even attempted to make union members, whose union was uninterested in the proceedings, part of these proceedings. This ground must fail.

[7] Grounds 4, 5, 6 and 7 are repetitive. In essence the applicants aver that I erred in finding that they were not candid and vague in their reply to direct assertions. These findings were made with regard to Ikageng's indebtedness to SARS and the general indebtedness of Ikageng.

[8] The applicants did not mention, in their founding affidavit the indebtedness of Ikageng to SARS. The applicants did not disclose Ikageng's indebtedness to RMD Kwik Form SA (Pty) Ltd or that the latter obtained a judgment against Ikageng. The applicants stated that Ikageng owed ABSA R17 382 145.60, it transpired that, that amount was not a true reflection of the debt owed to ABSA.

[9] In the answering affidavit Voltex stated that Mr. Moselane concluded a settlement agreement with SARS, dated 29 May 2019, in terms of which the indebtedness of Ikageng to SARS was to be settled by three monthly payments

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[2] Mothuloe Incorporated Attorneys v The Law Society of the Northern Province 2017 JDR 533 (SCA) at para 18.
[3] Unreported judgment of the Land Claims Court of South Africa Case No LCC 14R/2014.
[4] Ibid para 6. See also Wools v Wools 2018 JDR 1191 (FB).

of R500,000 with the balance to be reviewed. It further stated that in terms of the agreement Ikageng was indebted to SARS as follows:

- CIT for 2017 and 2018 in the sum of R3 863 704.95
- VAT in respect of the period August 2018 to March 2019 in the sum of R2 582 329.45
- PAYE, UIF, and SDL in respect of the period March 2017 to April 2019 in the sum of R 560 530.20.

[10] In reply to these allegations van der Merwe stated the following:

> 'Ikageng's indebtedness to SARS is common cause. Settlement agreement with SARS is common cause. My understanding is that the indebtedness to SARS was settled and that SARS is not a creditor… Annexure "TV5" does not include Ikageng's liability to SARS. This is an error in the document. The liability of Ikageng is to be increased from R 44,262,816.39 by the sum of R7,439,807.26 thereby totally (sic) R51 702 623.65. It may be that the debt has been paid without my knowledge, I do not know… SARS is a creditor of Ikageng. Insofar as SARS was not given notice of the application as a creditor, the application including this replying affidavit will be served on SARS prior (to) the hearing of this application.'

[11] The above quotation clearly shows the lack of candor and vagueness with regard to Ikageng's indebtedness to SARS. It is strange that the first applicant as the financial manager was not aware of the SARS debt. It is equally astounding that the second applicant, as the human resources manager was not aware that Ikageng did not pay PAYE and UIF monies deducted from the employees over to State institutions. I say no more about this issue.

[12] The applicants state that I failed to consider van der Merwe's testimony with regard to the contracts secured by Ikageng and the R28m owed by Mr. Moselane. In the judgment, I referred to all the contracts that van der Merwe referenced. Although Mr. Moselane's loan account is an asset it is clear that he was just not in a position to service the loan. He sold a house to pay part of the loan. The applicants do not state that he is in a position to pay the loan and if so when and how. Mr. Moselane did not file an affidavit to state whether he was in a position to pay the loan. In any event it is clear that despite his salary he used Ikageng's resources to pay the debts of his family trust.

[13] The fixed property was indeed considered and it was clear that there was no proper valuation with regard thereto. There is no evidence as to how the fair market value of the house was determined. The loan account and the immovable property would not enable Ikageng to trade. Even if they are considered, which they were, it still does not indicate that Ikageng would be able to be rescued.

[14] The applicants alleged that I failed to consider that under the watchful eye of business rescue practitioners, Mr. Moselane would no longer be able to secure a salary of approximately R200,000. They contend that I fail to appreciate that the first applicant's complaint was largely centered on Mr. Moselane's mismanagement of Ikageng in general, and the applicants' case was that should he be removed from the picture, the financial management of the company would be to the advantage of all creditors and employees of Ikageng. There is just no merit in this submission.

[15] Mr. Moselane is the pivot of the company. He is the rainmaker. Without him the company would not be able to secure any contracts. There is no indication whatsoever that he was prepared to take a reduction in salary. In fact, he took the salary while the company was clearly factually and commercially insolvent. Likewise, no affidavit supporting this proposition was filed. On the papers it is clear that the company would have taken a nosedive if Mr. Moselane was removed from the fray.

[16] The applicants aver that I erred in not deducting the value of the attached movables because that would have reduced the total amount of indebtedness to ABSA. The value of the attached movable property was unknown to ABSA, as well as Ikageng. The value of those vehicles would only be determined after they were sold on auction or otherwise. However, the importance of the fact that the vehicles were attached is that it was indicative of the fact that Ikageng would not be able to trade itself out of its financial quagmire.

[17] The applicants allege that there was no evidence to suggest that in the absence of whatever ABSA had financed "Ikageng would be unable to proceed and continue with its monthly working". During the recorded conversation with ABSA's attorney, the first applicant being present, Mr. Moselane stated, in no

uncertain terms, that Ikageng would not be able to trade without the motor vehicles. There was therefore enough evidence from Mr. Moselane's own mouth.

[18] The applicants further contended that my finding that there was no evidence to indicate upon what foundation Ikageng had selected which of its creditors it was to pay and which not, is wrong because those issues are *res inter alios acta.* This is a fallacious argument. Those dispositions may be void[5] or voidable[6]. They are therefore very important. It cannot be said that those dispositions are the exclusive business of Ikageng and those creditors.

[19] The applicants state that the indication by Voltex and ABSA that they would vote against the business rescue plan is a matter that deserves the attention of the Supreme Court of Appeal (SCA) because creditors should not and cannot be allowed to state that they would so vote without the company in distress being allowed to present its plan. This issue already received the attention of the SCA in **Oakdene**.[7]

[20] I have dealt with the issue and evidence presented with regard to the King Sabata Dalinyebo Municipality contract in paragraphs 38 and 39 of the main judgment.

[21] The assertion that I erred in finding that the applicants were serving an ulterior motive or purpose by filing the application is incorrect. The mere stating of the

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[5] Section 341 of the Companies Act 61 of 1973 reads:

"(1)…

(2) Every disposition of its property (including rights of action) by any company being wound-up and unable to pay its debts made after the commencement of the winding-up, shall be void unless the Court otherwise orders."

Section 348 reads as follows:

"A winding-up of a company by the Court shall be deemed to commence at the time of the presentation to the Court of the application for the winding-up."

[6] Section 340(1) of Companies Act 61 of 1973 reads as follows:

"Every disposition by a company of its property which, if made by an individual, could, for any reason, be set aside in the event of his insolvency, may, if made by a company, be set aside in the event of the company being wound up and unable to pay all its debts, and the provisions of the law relating to insolvency shall mutatis mutandis be applied to any such disposition."

Section 29 and 30 of Insolvency Act 24 of 1936 reads as follows:

"29(1)Every disposition of his property made by a debtor not more than six months before the sequestration of his estate or, if he is deceased and his estate is insolvent, before his death, which has had the effect of preferring one of his creditors above another, may be set aside by the Court if immediately after the making of such disposition the liabilities of the debtor exceeded the value of his assets, unless the person in whose favour the disposition was made proves that the disposition was made in the ordinary course of business and that it was not intended thereby to prefer one creditor above another.

(2)… [S 29(2) rep by s 9 of Act 64 of 1960.] …"

30(1) If a debtor made a disposition of his property at a time when his liabilities exceeded his assets, with the intention of preferring one of his creditors above another, and his estate is thereafter sequestrated, the Court may set aside the disposition.

(2)For the purposes of this section and of section 29 a surety for the debtor and a person in a position by law analogous to that of a surety shall be deemed to be a creditor of the debtor concerned."

[7] Oakdene Square Properties (Pty) Ltd v Farm Bothasfontein (Kyalami) (Pty) Ltd 2013 (4) SA 539 (SCA) at para 38.

chronology and the roles of the two applicants in Ikageng clearly shows the abuse of this Court's process.

[22] In my view there are no reasonable prospects of success on appeal. I have also considered section 17(1)(a)(ii) of the Superior Courts Act and conclude that there is no other compelling reason why this application should be granted.

[23] The application ought to be dismissed. There is no reason why the costs should not follow the success.

[24] I make the following order:

The application is dismissed with costs. Such costs to be paid by the first and second applicants jointly and severally, the one paying the other to be absolved.

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C.J. MUSI, JP

Appearances:

For the Applicants:	Adv. S. Grobler SC
	Instructed by Blair Attorneys
	Bloemfontein
For the 2nd Respondent:	Adv. N. Segal
	Instructed by Lovius Block
	Bloemfontein
For the ABSA Bank Ltd:	Adv. S. Tsangarakis
	Instructed by Symington & De Kok
	Bloemfontein