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. 615/2020

In the matter between

FIRST RAND BANK LIMITED **APPLICANT**

versus

JAN CHRISTIAAN OLIVIER (SNR) N.O. **1st RESPONDENT**

MARNA OLIVIER N.O. **2nd RESPONDENT**

KAREN VAN HUYSSTEEN N.O. **3rd RESPONDENT**

JAN CHRISTIAAN OLIVIER (JNR) N.O. **4th RESPONDENT**

(in their capacities as the Trustees for the time being of the JC Family Trust, Registration IT 893/95)

CORAM: **NAIDOO J**

HEARD ON: **Heads of Argument filed 11 August 2021**

DELIVERED ON: **10 NOVEMBER 2021**

JUDGMENT – LEAVE TO APPEAL

[1] This is an application by the respondents for Leave to Appeal against the whole of the judgment and final order of sequestration granted against the respondent Trust in this matter, which was delivered on 14 June 2021. The parties filed Heads of Argument for the court to consider the matter in Chambers, without the necessity of hearing oral arguments. Adv DB du Preez SC is on record for the respondents (as applicants in this application) and Adv P Zietsman SC, with Adv S Tsangarakis is on record for the applicant (respondent in this application). For convenience I will refer to the parties as they were cited in the main application.

[2] The judgment was assailed on a number of grounds, which in essence amount to the assertion that the court erred in confirming the *rule nisi* and granting the final order of sequestration against the estate of the Trust, whereas the *rule nisi* ought to have been discharged and the application should have been dismissed with costs. The judgment sets out the court's reasoning in detail and I do not propose to repeat those reasons here. Based on the evidence

before the court, it bore the duty to exercise its discretion in deciding whether an order for the final sequestration of the Trust should be granted. The reasons for exercising this discretion in favour of the applicant are clear from the judgment.

[3] The respondents argue, *inter alia*, that the court erred in finding that the applicant had discharged the onus upon it to establish that:

3.1 it had a claim against the Trust's estate which entitled it to apply for its sequestration;

3.2 the Trust had committed an act of insolvency; and

3.3 there is reason to believe that it will be to the advantage of creditors that the Trust's estate be sequestrated

[4] The argument on behalf of the Trust is that the court erred in rejecting the defence that not all the trustees signed the resolution. The applicant failed to present any expert evidence as to the authenticity of the signatures on the resolution but attacked the respondents' experts on technical issues. Where the applicant did not present evidence to counter that presented by the respondents, the latter's version should be accepted. The opinion of the respondents' expert that the signature on the resolution was not that of Claassen created a factual dispute and the applicant did not apply for leave to lead evidence on this dispute of fact.

[5] The respondents argue further that once the defence that the resolution was not signed by all trustees is accepted then that portion of the applicant's claim falls away and the trust's assets will exceed its liabilities. The court therefore erred in holding that the Trust's liabilities exceeded its assets. It should have discharged the *rule nisi*, and dismissed the application with costs. The respondents also argue that the Trust enjoys a reasonable prospect of success on appeal as another court may come to a different conclusion and order differently.

[6] Section 17 of the Superior Courts Act 10 of 2013 (the Act), now regulates the test to be applied in an application for leave to appeal. The relevant provisions of section 17(1) provide as follows:

"(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;" (my emphasis and underlining).

[7] Previously, an applicant was merely required to show that there is a reasonable possibility that another court, differently constituted, would find differently to the court against whose judgment leave to appeal is sought. It is clear from section 17(I), set out above, that the situation is now somewhat different, and an applicant for leave to appeal is

required to convince the court that there is a reasonable prospect of success and not merely a possibility of success. In the matter of *The Mont Chevaux Trust v Tina Goosen + 18 2014 JDR LCC,* Bertelsmann J held 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 whose judgment is sought to be appealed against."

Mont Chevaux has been followed in a number of decisions. See *Matoto v Free State Gambling and Liquor Authority (4629/2015) [2017] ZAFSHC 80 (8 June 2017)*, The Full Court in *Acting National Director of Public Prosecutions and Others v Democratic Alliance (19577/2009) [2016] ZAGPPHC 489 (24 June 2016)* also cited Mont Cheveau with approval.

[8] The applicant correctly argues that it has discharged the onus upon it in respect of the three issues I have set out in para 3 above. It also argues that the main application was not based solely on the premise that the Trust is factually insolvent, in the sense that its liabilities exceeded its assets. It alleged four different and separate acts of insolvency, which Jordaan J found constituted acts of insolvency in terms of section 8(e) and 8(g). This is indeed so, and this court accepted Jordaan J's assessment of the various acts and his findings that these were indeed acts of insolvency. The respondents did not

deal with these acts of insolvency or challenge this court's reliance on those findings of Jordaan J.

[9] As I indicated the reasons for granting the final order of sequestration in this matter are fully set out in the judgment. It is my view that based on those reasons, another would not come to another conclusion. It is, therefore, my view that the respondents do not enjoy a reasonable prospect of success on appeal.

[10] In the circumstances the following order is made:

The application is dismissed with costs

_____

S NAIDOO J

On behalf of the Applicants:	Adv P Zietsman SC with
	Adv S Tsangarakis
Instructed by:	Symington & De Kok
	169B Nelson Mandela Drive
	Bloemfontein
	(Ref: L Strating/FKJ0030)
On behalf of the Respondent:	Adv Adv DB du Preez SC
Instructed by:	MJ Lombaard Inc
	c/o Huggett Retief Inc
	62A Calliope Street
	Pentagon Park
	Bloemfontein
	(Ref: MJL001/0033/hr)