IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED:

Date: Signature: [redacted]

CASE NO: 19556/2020

DATE: 30 November 2023

In the matter between:

ALF'S TIPPERS CC	Applicant
and	
BALOYI, PAUL CAMBO	First Respondent
CASTLE, DARRYLL JOHN	Second Respondent
LUVHENGO, SHAMMY AREWANGA	Third Respondent
MANNING, CLAUDIA ESTELLE	Fourth Respondent
MAPASA, KHATHUTSHELO	Fifth Respondent
NDONI, ANDISWA THANDEKA	Sixth Respondent
SEFOLO, TSHEGOFATSO	Seventh Respondent

Coram: Ternent AJ

Heard on: 23 November 2023

Delivered: 30 November 2023

Summary:

Delivered: *This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 12h00 on 30 November 2023.*

APPLICATION FOR LEAVE TO APPEAL JUDGMENT

TERNENT, AJ:

[1] For convenience, I shall refer to the parties as they are in the trial action. All the defendants (albeit pertinently the fifth defendant) seek leave to appeal against my order ordering the fifth defendant to comply with the plaintiff's notice in terms of Rule 35(3) and provide it with the documents requested from him. This it does because he is still employed in his capacity as the Chief Executive Officer of Basil Read Limited (Registration No. 1962/002313/06) (in business rescue).

[2] The leave to appeal persists with the argument that the fifth defendant, who concedes that he has access to the documents and, furthermore, that the plaintiff is entitled to them argues that he is not in *"possession"* of these documents in terms of Rule 35 and that the documents should be obtained from variously Basil Read or the business rescue practitioners who are managing Basil Read in business rescue.

[3] The defendants also contend not only for reliance on the provisions of section 17(1)(a)(i) that *"the appeal would have a reasonable prospect of success"*, but the provisions of section 17(1)(a)(ii) of the Superior Courts Act 10 of 2013 that "*there is some other compelling reason why the appeal*

should be heard, including conflicting judgments" on the matter under consideration.

[4] The test, as provided for in section 17(1)(a), is that leave to appeal may only be granted where the Judge concerned is of the opinion that the appeal would have a *"reasonable prospect of success"* (section 17(1)(a)(i)). In this regard the Supreme Court of Appeal in ***Notshokovu v S***[1] confirmed that *"It is clear that the threshold for granting leave to appeal against the 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."*

[5] The Supreme Court of Appeal has explained that the prospects of success must not be remote, but there must exist a reasonable chance of succeeding. An applicant who applies for leave to appeal must show that there is a sound and rational basis for the conclusion that there are prospects of success.[2] An applicant must convince the Court on proper grounds that he has prospects of success on appeal and those prospects are not remote, but have a realistic chance of succeeding.

[6] More is required than a mere possibility of success, or that the case is arguable on appeal, or that the case cannot be categorised as hopeless.[3] In the decision of ***Dexgroup (Pty) Ltd v Trustco Group International (Pty) Ltd and Others***[4] Wallis, JA observed that a Court should not grant

---

[1] ***Notshokovu v S*** [2016] ZASCA 112 (7 September 2016)

[2] ***Ramakatsa and Others v African National Congress and Another*** (724/29) [2021] ZASCA 31 (31 March 2021)

[3] ***S v Smith*** 2012 (1) SACR 567 (SCA)

[4] ***Dexgroup (Pty) Ltd v Trustco Group International (Pty) Ltd and Others*** 2013 (6) SA 520 (SCA)

leave to appeal and indeed is under a duty not to do so where the threshold which warrants such leave has not been cleared by an applicant in an application for leave to appeal:

> *"[24] ... The need to obtain leave to appeal is a valuable tool in ensuring that scarce judicial resources are not spent on appeals that lack merit. It should in this case have been deployed by refusing leave to appeal."*

[7] Accordingly, it is required of a lower Court that it act as a filter to ensure that the Appeal Court's time is spent only on hearing appeals that are truly deserving of its attention and that the test for the grant of leave to appeal should thus be scrupulously followed.

[8] Mr Bokaba, counsel for the defendants first submission is that on the interpretation of the words *"possession and/or control"* within the meaning of Rule 35 there are two divergent interpretations. He submits that a consideration of the judgments in this division, to which I have referred in my judgment, namely the ***Loureiro***[5] judgment which followed ***Copalcor***[6], which adopted a wider interpretation of the word possession, are in conflict with two judgments in other divisions. It was again impressed upon me that in the decision of ***Tooch v Greenaway***[7] 1922 CPD 331 Watermeyer AJ determined, in consideration of Rule of Court No. 333 of the prevailing Rules of Court, no longer applicable today, that the word *"possession"* must be interpreted in a narrow sense. As such the learned judge found that because the required income tax return was in the possession of the Receiver of Revenue it could be called as a witness at the trial to produce it if is relevant. In addition, the judgment in

---

[5] ***Loureiro and Three Others v Imvula Quality Protection (Pty) Ltd*** 2019 [JOL] 43169 GJ at paras 61-67

[6] ***Copalcor Manufacturing (Pty) Ltd and Another v GDC Hauliers (Pty) Ltd (formerly GDC Hauliers CC)*** 2000 (3) SA 181 (W)

[7] ***Tooch v Greenaway*** 1922 CPD 331

Ramakarane v Centlec (Pty) Ltd,[8] a decision of the Free State Division in Bloemfontein, was mentioned again where the defendant had been compelled to discover under Rule 35(3), and Pienaar AJ found that the documentation was not *"in her possession and the documents are also not readily available"*. The applicant submitted that the documents were in her possession even though she did not have physical copies thereof. The documents, so the applicant said, could be requested and obtained from the bank and SARS. The Court applied the reasoning in ***Copalcor*** but then interpreted Rule 35(3) and the word *"possession"* as denoting physical possession. The learned judge found that if the defendant was required to obtain the documents the requirement in the rule stipulating that if the documents were not in her possession she should state their whereabouts, if known, would be rendered superfluous. The learned Judge also referred to ***Tooch*** and other decisions and said that the law has not changed. The learned judge also emphasised that under Rule 35(7) he has a discretion in applications to compel discovery and that he is not inclined to exercise his discretion in favour of the plaintiff. Notably, the Judge could not refer to the ***Loureiro*** decision as it only transpired three years later.

[9] In essence the point that has been taken relates to *stare decisis* and whether or not I am bound by these decisions in the Cape and Free State. Divisions. As already stated in my judgment I am not and there is authority for this point.[9] I am, however, bound by the judgments in my division and the application of a broader interpretation to "*possession and/or control*" has been confirmed in those judgments mentioned in my judgment.[10]

---

[8] ***Ramakarane v Centlec (Pty) Ltd*** (4907/2006) [2016] ZAFSHSC 51 (18 February 2016)

[9] ***Erasmus commentary to Rule 17(6)(i)*** *at OS 2023, page D-116 and cases mentioned there*

[10] ***Alf's Tippers CC v Martha Susanna Steyn***, Unreported decision, Case No. 11407/2019 dated 19 May 2020 and ***Hilbert Plant Hire CC v JS Brider and J Brider***, Unreported decision, Case No. 41890/19 (dated 3 August 2021)

[10] Insofar as the prospects of success on appeal are concerned, it was submitted to me that I have erred in not giving consideration to the business rescue principles and disregarded the fact that Basil Read (in business rescue) is managed by its business rescue practitioners. As a consequence Basil Read is a third party and the Rule does not require the fifth defendant to seek documents from third parties. Relying on the ***Ramakarane*** judgment, it was submitted to me that the judgment is compelling given the similarity of facts and that the documents are held by a third party and that Basil Read is also not a party to the proceedings.

[11] I have already set out that I am not bound to follow the ***Ramakarane*** judgment and, in any event do not agree with it, in the light of the judgments in this division and the interpretation of *"possession"* in a broader manner with the need for a fair trial and the constitutional obligations to ensure that a trial is run in an efficient manner. I do not accept that the plaintiff must be expected to issue subpoenas at great cost when the fifth defendant can simply request and obtain the documents from the business practitioners, with ease. I too have exercised my discretion under Rule 35(7) and compelled discovery by the fifth defendant.

[12] In so far as the issue of the fifth defendant's role in Basil Read (in business rescue) is concerned, and whether it is a third party, I am confined to the affidavits that were filed in this matter by him where he confirmed that he had access to the documents.[11]

[13] In his Rule 35 discovery affidavit he said:

> *"1. I am an adult male, employed as the Chief Executive Officer of Basil Read Limited (In Business Rescue) and executing my duties in the aforesaid capacity at*

[11] CaseLines, 048-60

the Defendants' place of business situated at Corporate Office: Block B, Viscount Office Park, Bedfordview, Gauteng Province.

2. *I am duly authorised to depose to this affidavit on behalf of the Defendants as I have access to the documents related to the abovementioned matter."*

[14] The fifth defendant listed and disclosed, in Part A of the First Schedule to his discovery affidavit, a number of documents *inter alia* Basil Read's financial statement for the year ended 31 December 2016, memoranda from Basil Read, ledgers, quotations from the plaintiff, purchase orders, minutes of the Board of Directors meeting *inter alia*. This to my mind is all documentation, which if he was still not involved (having been so authorised by the business rescue practitioners) in the management of Basil Read, which would not be his possession and control and one would expect he would not have access thereto.

[15] In his reply to the Rule 35(3) notice[12], he again affirms his position as CEO, although he says that these documents are in the possession of Basil Read Limited (in business rescue), if they exist.

[16] In his affidavit opposing this application, the fifth defendant says that Basil Read is in business rescue and under the control of its duly appointed business rescue practitioners but no more than that. He also says that because Basil Read is not a party to the proceedings and is a separate juristic entity, the plaintiff is under a misguided assumption that he has Basil Read's financial information.

[17] He notably accedes, however, to the plaintiff gaining access to the

---

[12] CaseLines, Annexure **"FA6"**, 048-67

requested documents.[13] He asserts, however, that the documentation belongs to Basil Read and can be requested from it or the business rescue practitioners. He affirms again that he is *"an executive director in my capacity as the Chief Executive Officer of Basil Read"*[14] and simply states that he is not in possession of the documents.

[18] In ***Ragavan and Others v Optimum Coal Terminal (Pty) Ltd***,[15] the Court looked at the tension between the roles of the business rescue practitioners and the directors during business rescue proceedings. Although the court found that the directors were significantly limited and the business rescue practitioners had *"full management control of the company in substitution for its board and pre - existing management"*[16]. Yet, the business rescue practitioners *"may delegate any power or function of the practitioner to a person who was part of the board or pre-existing management of the company"*.[17]

[19] The fifth defendant says *"The Applicant fails to establish a nexus between the business rescue practitioners resolving to utilise the expertise of management to consider appropriate aspects of the Turnaround Plan when developing the Business Rescue Plan and its allegations that the Respondents are in possession or control of the documents requested. The business rescue practitioners gleaning wisdom from management does not mean that the documents requested by the Applicant are in the Respondent's possession or control."*[18]

---

[13] CaseLines, 048-98, para 20

[14] CaseLines, 048-103, para 37

[15] 2022(3) SA512(GJ)

[16] Section 140 (1) (a) Companies Act 71 of 2008

[17] Section 140(1)(b) Companies Act 71 of 2008

[18] Caselines 048-106

[20] In my view the statement misconstrues the requirements for discovery and seeks to place a narrow interpretation on possession or control, in circumstances where the fifth defendant affirms the business rescue practitioners are continuing to use the expertise and wisdom of management.

[21] I remain of the view, that in the light of the judgments favouring the wide interpretation of possession, and a pragmatic approach to discovery[19], the fifth defendant has done very little to demonstrate that the documentation is not within his possession and control. He does not say that the business rescue practitioners have delegated to him a limited role in Basil Read and that he cannot obtain these documents without their authorisation. He is silent in his affidavit as to why the plaintiff must be burdened with this task.

[22] It is, of course, of no assistance to the defendants that Basil Read (in business rescue) or the business rescue practitioners are not cited in these proceedings. If they had been sued in this action, in which they have no interest, this would have constituted a material misjoinder.

[23] This is, moreover, not a situation where Basil Read, albeit in business rescue, is a third party independent of and disconnected from the fifth defendant, who continues in his employment as its CEO.

[24] The final ground for leave related to my factual finding that the remaining defendants were directors and part of the management of Basil Read. As the order was only made against the fifth defendant, this point and my finding would have no impact on the order made. It is trite that Court orders are appealed and not the reasoning underpinning such orders. Mr Bokaba did not seriously pursue this ground of appeal.

---

[19] ***Alf's Tippers CC v Steyn supra*** at paras [9] to [14]

[25] I am therefore of the view that because much of the argument presented in this application is the same as that made by the defendants' junior counsel at the hearing of the application, another Court would not consider the submissions made to be sufficiently persuasive or meritorious to justify leave. Furthermore, the only significant new argument is that of judicial precedence and given the view that I hold, holds no sway either.

[26] There is no measure of certainty that another Court would hold differently from this Court and there are no other compelling reasons including conflicting judgments in this division to grant leave to appeal.

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

1. The application for leave to appeal is dismissed with costs.

[redacted]

P V TERNENT
Acting Judge of the High Court of South Africa
Gauteng Division, Johannesburg

HEARD ON:	23 November 2023
DATE OF JUDGMENT:	30 November 2023
FOR PLAINTIFF:	Advocate C van der Merwe E-mail: dominus.cvdm@gmail.com Cell: 082 788 3911
INSTRUCTED BY:	Warffemius van der Merwe Inc. E-mail: jaco@wminc.co.za Cell: 082 821 3281
FOR DEFENDANTS:	Advocate T J B Bokaba SC E-mail: bokaba@mweb.co.za Cell: 083 271 2975 and Advocate M Salukazana E-mail: Salukazana@thulamelachambers.co.za Cell: 082 813 7094
INSTRUCTED BY:	Gwina Attorneys Inc. E-mail: mahlakuk@gwinaattorneys.co.za mthembun@gwinaattorneys.co.za mabokelag@gwinaattorneys.co.za Cell: 072 548 8745