

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION, JOHANNESBURG

CASE NUMBER: 2019/41681

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

B.C. WANLESS

28 APRIL 2023

In the matter between:

**EAMONN COURTNEY**

Applicant

and

**IZAK JOHANNES BOSHOF N.O.**

First Respondent

**WINNIE GLADNESS GUMEDE N.O.**

Second Respondent

**ABSA BANK LTD**

Third Respondent

**THE MASTER OF THE HIGH COURT (JOHANNESBURG)**

Fourth Respondent

**Neutral Citation:** *Eamonn Courtney v Izak Johannes Boshoff N.O. and Others* (Case No: 2019/41681) [2023] ZAGPJHC 397 (28 April 2023).

*This judgment was handed down electronically by circulation to the parties' and/or the parties' representatives by email and by being uploaded to Case Lines. The date and time for hand-down is deemed to be 10h00 on 28 April 2023.*

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**JUDGMENT**  
**(LEAVES TO APPEAL AND CROSS-APPEAL)**

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**WANLESS AJ**

**Introduction**

- [1] On the 20<sup>th</sup> of December 2022 this Court handed down judgment in this matter (a Special Opposed Motion) and made a number of orders. The relevant orders for the purposes of the present applications for leave to appeal and cross-appeal may be summarised as follows:
- 1.1 the application instituted by the Applicant was dismissed with all parties to pay their own costs. In respect of the costs payable by the First and Second Respondents, it was ordered that these costs were to be paid by them in their personal capacities and not from the administration of the Applicant's insolvent estate; and
- 1.2 the order of Moultrie AJ granted on 4 May 2020 was varied from a final to a provisional sequestration order of the Applicant's estate and deemed to be effective as such from that date.
- [2] The Applicant seeks leave to appeal to the Supreme Court of Appeal (*"the SCA"*) against portions of that judgment and the variation of the order granted on that date by the deletion of paragraphs 3 to 8 thereof and by replacing same with an order that the Applicant's application be granted with costs and dismissing the Third Respondent's conditional counter-application with costs.
- [3] In the event that this Court grants the Applicant leave to appeal the First and Second Respondents seek leave to cross-appeal in respect of the costs order made in relation to them.
- [4] The Third Respondent has sought leave to cross-appeal conditionally upon the Applicant being granted leave to appeal and being successful in that appeal. In clarification thereof, Counsel who appeared for the Third Respondent when these applications were heard, advised this Court that what the Third Respondent sought was that in the event of the Applicant being successful in his appeal before the SCA that the Third Respondent be given leave to move its counter-application before the SCA at the same hearing. The SCA could then, according to the Third Respondent, determine the merits of the counter-application and either grant or dismiss the counter-application.

## **The law**

[5] The test for the granting of leave to appeal pertinent to the present matter is set out in subsection 17(1) of the Superior Courts Act 10 of 2013 (*"the Act"*) 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;*

[6] Subsection 17(6) of the Act reads as follows:

- (6)(a) *If leave is granted under subsection (2) (a) or (b) to appeal against a decision of a Division as a court of first instance consisting of a single judge, the judge or judges granting leave must direct that the appeal be heard by a full court of that Division, unless they consider-*
  - (i) *that the decision to be appealed involves a question of law of importance, whether because of its general application or otherwise, or in respect of which a decision of the Supreme Court of Appeal is required to resolve differences of opinion; or*
  - (ii) *that the administration of justice, either generally or in the particular case, requires consideration by the Supreme Court of Appeal of the decision,*

*in which case they must direct that the appeal be heard by the Supreme Court of Appeal.*
- (b) *Any direction by the court of a Division in terms of paragraph (a), may be set aside by the Supreme Court of Appeal of its own accord, or on application by any interested party filed with the registrar within one month after the direction was given, or such longer period as may on good cause be allowed, and may be replaced by another direction in terms of paragraph (a).*

## **The grounds relied upon for leave to appeal and cross-appeal**

[7] Whilst applications of this nature are extremely important and require serious consideration (hence, in addition to the onerous workload facing both acting and permanent Judges in the Gauteng Division the time between hearing the applications



and the delivery of this judgment) it is not customary to deliver extensive judgments dealing with the grounds relied upon by the parties or their respective arguments in respect of same. These are all, to one extent or another, contained in the various notices seeking leave to appeal and cross-appeal (the parties in this matter not having filed Heads of Argument in respect of the present applications). In the premises, this judgment will not be burdened unnecessarily by dealing in detail therewith, save for the single exception as set out below.

- [8] In paragraph 9 of the Applicant's Notice of Application for Leave to Appeal the Applicant avers that this Court erred by "...*not setting aside the ex parte order under section 18(3) of the Act.*". During the course of argument before this Court, Adv Smit on behalf of the Applicant specifically abandoned any reliance thereon as a ground of appeal.
- [9] In essence the Applicant submitted to this Court that application for leave to appeal to the SCA should be granted on the basis that not only was there a reasonable prospect that another court would come to a different decision but that it was ultimately in the interests of justice that such leave be granted. This was in light of, *inter alia*, the lack of authority pertaining to the issue as to whether this Court had the jurisdiction to vary the order of Moultrie AJ as it did, relying on, *inter alia*, the provisions of subsection 149(2) of the Insolvency Act.
- [10] On behalf of the First and Second Respondents, it was submitted that this Court erred in finding that they, as the appointed provisional co-liquidators of the Applicant's insolvent estate, should pay the costs of the application in their personal capacities. This submission was based on the fact that, *inter alia*, their conduct had not been unreasonable under the circumstances and that this Court had not given them an opportunity to explain that conduct before, in the exercise of its discretion, making the costs order that it did.
- [11] As for the Third Respondent, its grounds are that should the appeal succeed the order of Moultrie AJ would be declared a nullity and if the appeal court granted the relief sought in the counter-application then the practical effect would be to restore the *de facto* position pertaining to the Applicant's insolvent estate.

## **Conclusion**

- [12] This Court, having carefully considered the various grounds relied upon by the parties and the submissions made in support thereof, is of the opinion that the Applicant should be granted leave to appeal to the SCA. At the same time, particularly in light of the fact that the appeal will be heard by the SCA, leave should also be granted to the First and Second Respondents to cross-appeal to the SCA.

- [13] In granting leave to the Applicant and to the First and Second Respondents to appeal and cross-appeal to the SCA rather than to a full court of the Gauteng Division, this Court is acutely aware of the provisions of subsections 17(6)(a)(i) and (ii) of the Act. It follows that this Court has applied same. Moreover, this Court is also well aware of the earlier decisions by the SCA whereby the High Courts have been cautioned not to burden the roll of the SCA unnecessarily by granting leave to appeal to that court in respect of matters which do not require the attention of the SCA to the detriment of those matters which do. In this particular matter, this Court is satisfied that leave to appeal and cross-appeal (as set out above) should be granted to the SCA.
- [14] The application by the Third Respondent for leave to “conditionally” cross-appeal in this matter, for the reasons dealt with above, is more problematic. This is so, particularly in respect of the applicable provisions of the Act relating to this Court granting leave to appeal to the SCA. The question arises as to whether this Court has the requisite jurisdiction to make an order granting leave to the Third Respondent on the basis that the SCA should hear and rule on the counter-application in the event of the Applicant’s appeal being successful, that is, the order granted by Moultrie AJ on the 4th of May 2020 being declared a nullity.
- [15] In that regard, this Court finds solace in the provisions of two (2) subsections of the Act, namely subsections 17(6)(b) and 17(5). Subsection 17(6)(b) is set out above. The provisions of subsection 17(5) read as follows:
- (5) *Any leave to appeal may be granted subject to such conditions as the court concerned may determine, including a condition-*
- (a) *limiting the issues on appeal; or*
- (b) *that the appellant pay the costs of the appeal.*
- [16] If one applies the provisions of the foregoing subsections of the Act then this Court will be in a position to grant conditional leave to the Third Respondent to cross-appeal to the SCA without, in any manner whatsoever, being seen to attempt to dictate to the SCA (which this court would never deem to do) that the SCA, sitting as a court of appeal, should be obliged, in the event of the Applicant being successful in his appeal, to hear and determine the counter-application instituted by the Third Respondent in this Court.

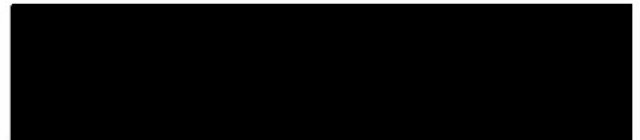
### **Order**

- [17] In the premises, this Court makes the following order:

1. The Applicant is granted leave to appeal to the Supreme Court of Appeal.



2. The First Respondent and the Second Respondent are granted leave to cross-appeal to the Supreme Court of Appeal.
3. The Third Respondent is granted leave to conditionally cross-appeal to the Supreme Court of Appeal on the basis that if the Supreme Court of Appeal upholds the Applicant's appeal the Third Respondent will seek an order as set out in the Third Respondent's conditional counter-application under case number 41681/2019 in the High Court of South Africa, Gauteng Division, Johannesburg.
4. In terms of subsection 17(5) of the Superior Courts Act 10 of 2013 (*"the Act"*) paragraph 3 hereof is subject to the condition that the Supreme Court of Appeal, in terms of, *inter alia*, subsection 17(6)(b) of the Act, grants consent to the Third Respondent, in the event of the Applicant's appeal being upheld, to hear the Third Respondent's conditional counter-application and grant an order in terms thereof, *alternatively*, dismiss same.
5. The costs of the applications for leave to appeal and cross-appeal will be costs in the appeal and cross-appeals.



**B.C. WANLESS**

Acting Judge of the High Court  
Gauteng Division, Johannesburg

**Heard:** 10 February 2023  
**Judgment:** 28 April 2023

**Appearances**

**For Applicant:** Adv. JG Smit  
**Instructed by:** Gothe Attorneys Inc.

**For First/Second Respondents:** Adv. S Symon SC  
**Instructed by:** Cox Yeats

**For Third Respondent:** Adv. A Foster  
**Instructed by:** Cox Yeats