REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case Number: 2023/028612

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

_____ ___
DATE SIGNATURE

In the matter between:

MARK MORRIS FARBER	First Applicant
10 FIFE AVENUE BEREA (PTY) LIMITED	Second Applicant
28 ESSELEN STREET HILBROW CC	Third Applicant
39 VAN DER MERWE STREET HILLBROW CC	Fourth Applicant
HILLBROW CONSOLIDATED INVESTMENTS CC	Fifth Applicant

and

TUMISANG KGABOESELE N.O. **(cited in his capacity as the Business Rescue Practitioner of 266 Bree Street (Pty) Ltd)**	First Respondent
266 BREE STREET JOHANNESBURG (PTY) LTD **(In business rescue)**	Second Respondent
TUHF LIMITED	Third Respondent

THE COMPANIES AND INTELLECTUAL PROPERTY COMMISSION Fourth Respondent

Case Number: 2023/032790

In the matter between:

TUHF LIMITED Applicant

and

266 BREE STREET JOHANNESBURG (PTY) LTD (In business rescue) First Respondent

TUMISANG KGABOESELE N.O. (cited in his capacity as the Business Rescue Practitioner of 266 Bree Street (Pty) Ltd) Second Respondent

THE COMPANIES AND INTELLECTUAL PROPERTY COMMISSION Third Respondent

Business rescue – application to remove practitioner – counterapplication under s 141(2) of Companies Act 71 of 2008 to discontinue business rescue and place company into liquidation – powers of court under s 141(3) - whether court may extend business rescue plan after execution thereof has failed – held discretion to grant appropriate order under s 141(3) does not permit court to impose extension of business rescue contrary to wishes of creditors – company placed into final liquidation.

LEAVE TO APPEAL JUDGMENT

KEIGHTLEY, J

1. This is an application for leave to appeal against the whole of my judgment and order encompassing the two applications referenced above and the counter-applications pertaining to them.

2. In paragraph 1 of my order I dismissed the Applicants' (under case number 028612/23) application with costs on an attorney and client scale. I refer to this as the costs order. In paragraph 2, I declared that Mr Farber and Hillbrow Consolidated Investments CC were in breach of two court orders granted by the learned Senyatsi J. I refer to this as the declaratory order. In paragraph 3, I granted interim relief permitting

TUHF (the respondent in this application for leave to appeal) to exercise certain powers under one of the Senyatsi J orders and interdicting Mr Farber and Hillbrow Consolidated Investments CC from interfering in the exercise of those powers. I refer to this as the interim interdict. Finally, in paragraphs 4 and 5, I made an order discontinuing the business rescue proceedings in respect of 266 Bree Street Johannesburg (Pty) Ltd (266 Bree) and placing it under final liquidation. I refer to this as the liquidation order.

3. Mr Farber and his associated entities are the applicants in the application for leave to appeal. They appeal against each of these orders. I will deal with the grounds of their intended appeal by dealing first with the application in respect of the liquidation order, thereafter the interim interdict, then the declaratory order, and finally the costs order. First, I record the recognised test for granting leave to appeal.

The test for granting leave to appeal

4. Under s17(1)(a) of the Superior Courts Act, leave to appeal may only be given where the Judge is of the opinion that the appeal (i) would have a reasonable prospect success or (ii) there is some other compelling reasons why the appeal should be heard, including conflicting judgments on the matter under consideration. The test for granting leave under this section is well settled. The question is not whether the case is arguable or another court may come to a different conclusion.[1] Further, the use of the word 'would' in s 17(1)(a)(i) imposes a more stringent and vigorous threshold test than that under the previous Supreme Courts Act, 1959. It indicates a measure of certainty that another court will differ.[2] The *Mont Cheveaux* test was endorsed by a Full Court of this Division in the unreported case of *Zuma & Others v the Democratic Alliance & Others.*[3]

5. This test means that:

> 'An applicant for leave to appeal must convince the court on proper grounds that there is a reasonable prospect or realistic chance of success on appeal. A mere possibility

[1] *R v Nxumalo* 1939 AD 580 at 588
[2] *Mont Cheveaux Trust v Goosen* [20014] SALCC 20 (3 November 2014); *Notshokuvo v S* [2016] ZASCA 112 (7 September 2016))
[3] Case no: 19577/09, dated 24 June 2016

> of success, an arguable case or one that is not hopeless, is not enough. There must be sound, rational basis to conclude that there is a reasonable prospect of success on appeal.'[4]

6. An applicant for leave to appeal may assert, in the alternative, that there are other compelling reasons why the appeal should be heard. For example, as the section notes, inflicting judgments, or, I venture to add, an important point of law that warrants attention by a higher court.

First ground of appeal: the liquidation order

7. As I noted in my main judgment, the entire course of litigation culminating in the liquidation order was precipitated by an application by Mr Farber and his associated entities, who sought an interdict preventing the appointed business rescue practitioner in respect of 266 Bree, Mr Kgaboesele, from acting as the business rescue practitioner and from implementing the business rescue plan which had been adopted. Mr Kgaboesele counter-applied, under s 141(2)(a)(ii) of the Companies Act 71 of 2008 (the Act) for an order discontinuing business rescue proceedings and placing 266 Bree in liquidation.

8. My main judgment records the eleventh-hour turn-about by the applicants who abandoned the main relief they had sought. They instead sought an order, based on s141(3) of the Act, on the basis that I had a discretion under that section to grant any appropriate relief, including an order to extend the business rescue plan and appoint a new business rescue practitioner whose task would be to sell the immovable property owned by 266 Bree. I refer in this regard to paragraphs 9 - 11 of my judgment.

9. Mr Hollander, who appeared for the applicants in the application for leave to appeal sought to persuade me that the interpretation of s 141(3) raised an important question of law which had not as yet, as I noted in my judgment, enjoyed consideration by any other court. This, he submitted was a compelling reason to grant leave to appeal to the Supreme Court of Appeal.

[4] *MEC for Health, Eastern Cape v Mkhitha* 2016 JDR 2214 (SCA)

10. I dealt with this issue in paragraphs 13 - 37 of my judgment. In paragraph 27, I found that:

> 'The underlying purpose of s 141(2) would seem to me to be that once it is clear to the business rescue practitioner that business rescue has failed, steps must be taken to bring the process to an end. The proposition that the discretion under s 141(3) permits a court to grant an appropriate order in the form of an extension of a business rescue plan that has failed in its execution is contrary to this underlying purpose as well as the general scheme of business rescue under the Act.'

And in paragraph 31, I found that:

> 'By parity of reasoning, the court has no power to foist onto the majority of creditors an extension of a business rescue plan, that, while initially supported, has now failed in its implementation. The plan is now lifeless, and the court simply does not have the power to breathe life back into it. This is particularly so where, it is common cause, TUHF holds sufficient voting rights to determine the approval or rejection of any business rescue plan.'

11. It is these finding that Mr Hollander submitted raised an important legal question giving rise to compelling reasons to grant the application for leave to appeal. He says that there is a need for the Supreme Court of Appeal to apply its mind to the issue of whether the power of a court to grant 'any other order (it) considers appropriate in the circumstances' includes the power to extend business rescue proceedings, and a business rescue plan, in circumstances where the existing plan has failed.

12. I am not persuaded by these submissions. My primary reason for this is because my rejection of the applicant's attempt to secure an endorsement for the extension of business rescue, and to keep the failed business rescue plan alive, did not hinge solely on my interpretation of s 141(3). It is so that my interpretation of that section did not support the wide powers contended for by the applicant. However, and critically, in paragraph 31, I went on to say that:

> 'Even if it were possible, in principle, of being put to the vote again, TUHF has made it clear in its affidavits that it will not vote in favour of an extension or a new plan. It cannot be that under its power to make an "appropriate" order, this court can impose on TUHF the extension of business rescue proceedings which have no hope of succeeding without TUHF's support.' (emphasis added)

13. What this shows is that my ultimate refusal to grant the relief sought by the applicants was based on my analysis of the facts of the case at hand. I expressly considered whether, assuming an alternative interpretation was sound, the relief sought would be an 'appropriate' exercise of my discretion in the case before me. In other words, if the matter were to be reconsidered by another court, it would not be necessary for that court to determine whether my interpretation of s 141(3) was correct

or not. An appeal, in all likelihood, could and would be determined on the relevant facts, and not my interpretation of the law. The interpretation issue raised by the applicants does not constitute a 'compelling reason' to permit an appeal to the Supreme Court of Appeal.

14. As the whether there is a likelihood of another Court reaching a conclusion different to mine on the facts, I am not persuaded on this score either. My judgment discusses in full the relevant facts pertaining to the question of whether an extension of the business rescue process would be likely to render a better return for creditors. I gave full reasons for rejecting the applicants' submissions based on those facts. Mr Hollander sought to persuade me that there was evidence that Mr Kgaboesele had not done enough to market the property and that another court would find that if a further opportunity were to be given to a new business rescue practitioner to do so, the property might be sold. At best for the applicants, and for the detailed reasons provided in my judgment, the submission gives rise to nothing more than an outside chance that, on these facts, another court would find that the sale of the property by a new business rescue practitioner would be possible, and that it would yield a better return for creditors than a sale by a liquidator. An outside chance of success on appeal does not meet the test for granting leave.

The second ground: the interim interdict

15. I deal with the interim interdict in paragraphs 38 - 46 of my main judgment. Mr Hollander did not raise any new issues in the application for leave to appeal. He submitted that there is a reasonable prospect that another Court would find that TUHF failed to establish that it had a *prima facie* right to the relief because it was not possible for Mr Farber to comply with both of the relevant Senyatsi J orders at the same time. TUHF's right under the cession order granted by Senyatsi J gave it a clear right immediately to take cession of rentals. It was this right to which the interdict gave effect. Given the history of Mr Farber's uncooperative conduct in relation to TUHF, the interdict was obviously necessary, as an interim measure, to ensure that TUHF could exercise its rights to the rentals. I do not believe the there is any reasonable prospect of another Court holding differently.

The third ground: the declaratory order

16. This issue is dealt with in paragraphs 47 - 52 of my main judgment. The applicants submit that the original relief sought by TUHF was to hold the applicants in contempt of the Senyatsi J orders. As noted in paragraph 48 of my main judgment, the original relief was rendered unnecessary due to Mr Farber's amended stance adopted in the additional heads of argument filed on the morning of the hearing. Mr Farber no longer insisted that he needed to be present when TUHF attended at the premises, and he no longer sought to hold Mr Kgaboesele to the PMA with Hillbrow Consolidated Investments CC. TUHF pointed out in its submissions to the court at the hearing of the main matter that this changed stance had the effect of purging any contempt on the part of the applicants. In those circumstances, it was not necessary to proceed to seek the contempt relief.

17. In the application for leave to appeal, the applicants again submitted, as they had done at the hearing, that once TUHF no longer sought an order of contempt, I ought to have simply dismissed their application and not granted relief in an amended form, namely, a declarator to the effect that the applicants had breached the orders in question.

18. I found that:

> 'By seeking a declaration of breach TUHF is not going outside of the facts averred and the relief originally sought. All it is doing is seeking less than what it had originally asked the court to rule on. A ruling on breach may at least be relevant to the question of costs and it may provide certainty for the liquidator in her dealings with Mr Farber in the future. It will also provide certainty for TUHF for purposes of implementing the interim interdict. A ruling on breach is thus not academic.'

On the facts that were before me, I do not believe that there is a realistic prospect that another court would find differently.

The fourth ground: Costs order

19. The applicants take issue with my order dismissing their application with an attorney and client costs order. I should point out that none of the other orders attracted punitive costs. I made a point in paragraphs 54 and 55 of my judgment of detailing why, in the exercise of my discretion, I concluded that a punitive costs order was warranted. Further support for the reasons for the exercise of my discretion in awarding punitive costs can be found in paragraph 9.

20. Mr Hollander submitted that mere criticism of the conduct of a litigant was not sufficient to warrant a punitive costs order. As is apparent from my judgment, my punitive costs award was not based simply on benign criticism of the applicants' conduct. Their conduct was untenable: they initiated the entire process of litigation on an urgent basis on grounds they subsequently abandoned. The complexity of the issues raised, in part because of the applicants' original application, persuaded the Deputy Judge President to allocate the matter for special hearing. The applicants' abandonment of their primary case came at the very last minute, in fact, on the morning of the hearing, at considerable inconvenience not only to the other parties, but indeed the court. Mr Kgaboesele was accused of egregious conduct as a business rescue practitioner, only for these allegations to be side-lined to a great extent. Contrary to what Mr Hollander submitted, there was no explanation why the applicants did not change their stance earlier.

21. It is trite that costs are a matter for the Court's discretion. In making an appropriate order of costs a Court exercises a true discretion. While an appeal against a costs award is not prohibited, exceptional circumstances should exist before an appellate court will interfere. It is not simply a question of whether another Court would have decided differently, were it placed in my shoes. The question is whether another Court would find that I failed to exercise my discretion judicially in awarding punitive costs. It is not unusual for punitive costs awards to be made against litigants where their conduct is such as to undermine the administration of justice by putting the court and other parties to considerable inconvenience. I am not persuaded that another Court would find that I acted injudiciously in making a punitive costs award (in part only, I should add) given the conduct of the applicants.

21. For all of these reasons, I find that there are no prospects of success on appeal, nor is there another compelling reason for me to grant leave.

Order

I make the following order:

The application for leave to appeal is dismissed with costs.

R M Keightley

JUDGE OF THE HIGH COURT

GAUTENG DIVISION, JOHANNESBURG

Date of Hearing: 27 July 2023

Date of Judgment: 01 August 2023

APPEARANCES

Case Number: 2023/028612

For the Applicants:	R A Solomon SC L Hollander
Instructed by:	SWVG Inc Attorneys
For the First and Second Respondents:	D Mahon K Mitchell
Instructed by:	Thomson Wilks Inc
For the Third Respondent:	A C Botha SC E Eksteen
Instructed by:	Schindlers Attorneys

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For the Applicants:	A C Botha SC E Eksteen
Instructed by:	Schindlers Attorneys
For the Respondents:	R A Solomon SC L Hollander
Instructed by:	SWVG Inc Attorneys