REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG LOCAL DIVISION, JOHANNESBURG)

DELETE WHICHEVER IS NOT APPLICABLE

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

22 February 2024
DATE [redacted] MJ ENGELBRECHT

Case No: 2022/011114

In the matter between:

MARYNA ESTELLE SYMES *N.O.*	First Applicant
PINKIE MARTHA MAHLANGU *N.O.*	Second Applicant
(in their capacities as the duly appointed joint liquidators of Manor Squad Services (Pty) Ltd (in liquidation)	
and	
DE VRIES ATTORNEYS INCORPORATED	First Respondent
KHOZA, LEON PERCY	Second Respondent

JUDGMENT
(APPLICATION FOR LEAVE TO APPEAL)

ENGELBRECHT AJ:

Introduction

[1] The first respondent (De Vries) seeks leave to appeal the whole of this Court's judgment of 10 July 2023 under case number 2022/011114 (the Main Judgment). Leave to appeal is sought to the Supreme Court of Appeal, alternatively to a Full Bench of this Division.

[2] The order made in the Main Judgment was for the repayment by De Vries of various amounts, pursuant to an application by the joint liquidators of Manor Squad Services (Pty) Ltd (in liquidation) in terms of section 341(2), read with section 348, of the Companies Act 61 of 1973 (Old Companies Act). This, in circumstances, where De Vries had received payments between the date of the issue of the application for the winding up of Manor Squad Services (Pty) Ltd (Manor Squad) and the date of the final winding up order, during which time Manor Squad is said to have been unable to pay its debts. The central question in the Main Judgment was whether the payments amounted to "*dispositions*" in respect of which De Vries was the disponee.

The test for leave to appeal

[3] For leave to appeal to be granted in this matter, I have to be satisfied that the requirements of section 17(1)(*a*) of the Superior Courts Act 13 of 1995 (Superior Courts Act) are met – that the appeal would have a reasonable prospect of success or that there is some other compelling reason why the appeal should be heard.

[4] The use of the word "*would*" in section 17(1)(a)(i) of the Superior Courts Act, indicates a measure of certainty that another court will differ from the court whose judgment is sought to be appealed against (see *Ferriers v Wesrup Beleggings CC* 2019 JDR 1148 (FB) at § 7). In *Acting National Director of Public Prosecutions v Democratic Alliance* 2016 JDR 1211 (GP) the Full Bench of the Gauteng Division, Pretoria referred with approval to what was said by Bertelsmann J in *The Mont Chevaux Trust v Tina Goosen and 18 Others*, namely:

> *'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, see Van Heerden v Cronwright and Others 1985 (2) SA 342 (T) at 343H. 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] In *S v Smith* 2012 (1) SACR 567 (SCA) at paragraph 7, Plasket AJA explained the meaning of a "*reasonable prospect of success"* as follows:

> '*What the test of reasonable prospect of success postulates is a dispassionate decision, based on the facts and the law, that a court of appeal could reasonably arrive at a conclusion different to that of the trial court. In order to succeed, the*

appellant must convince this court on proper grounds that he has prospects of success on appeal and that these prospects are not remote but have a realistic chance of succeeding. More is required to be established than there is mere possibility of success, that the case is arguable on appeal or that the case cannot be categorized as hopeless. There must, in other words, be a sound, rational basis for the conclusion that there are prospects of success on appeal.'

[6] Moreover, since section 17(1)(a) lists the requirements disjunctively, I may also grant leave if there is some other compelling reason to grant leave. But, in doing so, this Court has to heed the consideration that a liberal approach to granting leave is discouraged as being inconsistent with section 17(1) of the Superior Courts Act. As Wallis JA stated in *Dexgroup (Pty) Ltd v Trustco Group International (Pty) Ltd and Others* 2013 (6) SA 520 (SCA) at paragraph 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*".

The grounds for leave

[7] I do not propose to rehearse the content of the application for leave to appeal or the arguments that served before me, nor to repeat what was set out in the Main Judgment. I am mindful that an appeal is supposed to be aimed at an order of the Court and not the reasoning.

[8] The first ground for seeking leave to appeal is that the requirement of section 341(2) of the Old Companies Act – that Manor Squad was unable to pay its debts – was not met. That ground must fail without more, in circumstances where De Vries had admitted the allegation that Manor Squad was provisionally and finally wound up on the basis that it was unable to pay its debts.

[9] The second ground is De Vries' contention that it was not the beneficiary of the payments and therefore that the order failed adequately to balance the competing rights and interests of the parties.

9.1. Here, the position is less clear.

9.2. The Main Judgment engaged extensively with the relevant jurisprudence, in particular the judgment of the Supreme Court of Appeal (SCA) in *Van Wyk Van Heerden Attorneys v Gore NO and another* [2022] 4 All SA 649 (SCA) (*Gore*), as well as the *M and another v Murray NO and others* 2020 (6) SA 55 (SCA) (*Iprolog*), a judgment concerning a deposit into the trust account of an attorney who acted for a nominated payee. Regard was also had to the judgment in *Zamzar Trading (Pty) Ltd (in liquidation) v Standard Bank of SA Ltd* 2001 (2) SA 508 (W) (*Zamzar*) at 515B-C, where the Court expressed the view that it would be "*repugnant to logic and law"* to "*create a situation where a principal could visit liability on his on his agent for performing precisely the mandate which it had given to its agent"*. In *Gore* (at para 25) the SCA explained that the "*reasoning*

strikes me as unassailable and equally applicable to an attorney who is merely instructed to make a payment" (*Gore* at para 25).

9.3. This Court was persuaded to make the order that it did on the ground that De Vries was not a mere conduit for payment, particularly in relation to two separate payments of R30 000 and R200 000 that corresponded with invoices De Vries had rendered. In *Gore* (at para 41), the SCA considered the situation where payments of fees are made to attorneys from their trust account: "*The attorneys made them part of their assets when <u>they appropriated them to settle their fees and pay disbursements incurred on behalf of their clients</u>. As such, they clearly benefited from the deposit of those two amounts. This despite their not having breached the principles governing the operation of the trust account"* (emphasis supplied). The principle as enunciated in *Gore* appears to be unassailable, and no leave can competently be granted in relation to the orders for the payment of the R30 000 and the R200 000.

9.4. However, in relation to the payment to De Vries of R1 000 000, in order to make bail payment for the benefit of Mr Marsland, the sole director of Manor Squad, the position may not be so clear-cut. This Court considered that there was a disposition, based on the consideration that De Vries appropriated the money, in order to pay a "*disbursement"* on behalf of Mr Marsland. However, the judgments in *Gore, Iprolog* and *Zamzar* may be read differently, to suggest that

payments of this kind may potentially not be regarded as dispositions within the meaning of 341(2) of the Old Companies Act.

[10] I consider that there are reasonable prospects that De Vries would succeed in an argument that the bail monies paid to it did not constitute dispositions. This Court is of the view, having considered the grounds of appeal and the arguments presented, that the proper interpretation of the judgments in *Gore, Iprolog* and *Zamzar* and their bearing on the nature of the bail money payments enjoys reasonable prospects of success. I would consider also that there is a compelling reason to grant leave, given the effect that the orders relating to the payment of the bail money may have on the position of legal practitioners that receive monies in trust, with instructions to make onward payments. The Court is thus inclined to grant leave, but only in respect of the orders made relating to the payment of the bail money.

[11] The third basis advanced for leave to be granted is the punitive costs order. The punitive costs order related to the reliance on false statements on oath. This Court's view on the prospects of success in challenging an order concerning the payment of the bail money does not affect the basis upon which the punitive costs order was granted.

[12] On the question of the Court to which leave to appeal is to be granted, I take note that both the *Gore* and *Iprolog* judgments are judgments of the Supreme Court of Appeal, and since the interpretation of those judgments would stand centrally in the consideration of the appeal, I consider it appropriate that the appeal be heard by that Court.

[13] In view of the limited basis for granting leave to appeal, I do not consider it appropriate to make an order regarding costs in the application for leave to appeal at this stage. The costs of the application are to be costs in the appeal.

ORDER

[14] In the circumstances, I make the following order:

14.1. The first respondent is granted leave to appeal paragraphs 1.1 and 1.2 of the order of 10 July 2023 to the Supreme Court of Appeal;

14.2. Costs to be costs in the appeal.

_____ [redacted] __

MJ ENGELBRECHT

Acting Judge of the High Court

Gauteng Local Division, Johannesburg

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 on 22 February 2024.

Heard on:	6 February 2024
Delivered:	22 February 2024
Appearances:	
For Applicants:	P Stais SC with LF Laughland
Instructed by:	Brooks & Braatvedt Inc
For First Respondent:	SB Friedland
Instructed by:	Beder-Friedland Inc.