IN THE HIGH COURT OF SOUTH AFRICA,

GAUTENG DIVISION, JOHANNESBURG

Case Number: 5098/2022

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

21 February 2025

[redacted]

In the matter between:

FIRSTRAND BANK LIMITED (FIRST NATIONAL BANK division)	**Applicant**
And	
KELIANA GROUP (PTY) LTD	**Respondent**
NONHLANHLA RUTH MAVIE	**Intervening Party**

LEAVE TO APPEAL JUDGMENT

Mdalana-Mayisela J

[1] The intervening party in her personal capacity and on behalf of the respondent company seeks leave to appeal to the Full Court of this Division, alternatively to the Supreme Court of Appeal a judgment handed down by this court on 31 July 2024, placing the respondent company under a final winding up. The application is opposed by the respondent.

[2] First, I deal with the issue of the *locus standi*. The intervening party has no *locus standi* to bring the leave to appeal application on behalf of the respondent company that has been liquidated because the powers of the respondent company have been diverted to the liquidators.

[3] I now deal with the leave to appeal application brought by the intervening party in her personal capacity. She brought this application in terms of section 17(1)(a)(i) of the Superior Courts Act 10 of 2013, which provides that:

"*(1)(a) Leave to appeal may only be given where the judge or judges concerned are of the opinion that-*
(i) the appeal would have a reasonable prospect of success;"

[4] In the leave to appeal application the intervening party contended that the appeal would have reasonable prospects of success on the following grounds.

[4.1] The court erred in ordering the final winding up of the respondent company after Mia J held in the summary judgment application that the intervening party has a bona fide defence against the claim brought by the applicant; and

[4.2] The court erred in ordering the final winding up of the respondent company while there is a pending action between the applicant and intervening party, and the agreement together with the debt pleaded in the action proceedings are the same as those pleaded in the liquidation proceedings.

[5] The contentions made by the intervening party in the leave to appeal application were argued on her behalf in the main application. The intervening party is buying time

against the execution of my order by bringing this leave to appeal application and this is an abuse of the court process.

[6] I have dealt with the first ground in paragraphs 19 and 20 of the main judgment. Mia J did not hold that the intervening party has a bona fide defence against the claim brought by the applicant. She granted leave to defend the action because the amount claimed in the combined summons differed from the amount stated in the draft order prepared by the applicant. This ground for leave to appeal has no merit.

[7] I have also dealt with the second ground in paragraphs 16 and 18 of the main judgment. The fact that the agreement together with the debt pleaded in the action proceedings are the same as those pleaded in the liquidation proceedings is not sufficient to prove a defence of *lis alibi pendens*. The parties and cause of action in the action proceedings are not the same as in the winding up proceedings. This ground also is without merit and it must fail.

[8] The intervening party raised a new ground for leave to appeal from the bar and not pleaded in the leave to appeal application. She contended that the court did not consider the value of the property bonded to the bank when determining the issue of the respondent company's insolvency. It is trite that a party is bound by his or her pleadings and ordinarily, he or she will not be allowed to raise a different or fresh case without a due amendment. A court is equally bound by those pleadings and should not pronounce upon any claim or defence not made in the pleadings by the parties. A court may relax this rule where the issue involves a question of law which emerges fully from the evidence or is apparent from the papers.[1]

[9] Counsel for the intervening party conceded that the respondent company and intervening party failed to adduce evidence on the value of the property in the main application. He also conceded that the evidence on assets and liabilities of the respondent company was not presented in the main application. The onus was placed on the respondent company to adduce the aforesaid evidence. The counsel for the intervening party argued that the court should have instructed the relevant parties to

---

[1] Minister of Police v Gqamane (226/2022) [2023] ZASCA 61 (3 May 2023).

adduce the aforesaid evidence before exercising its discretion to order a final winding up of the respondent company. It was not the court's duty to assist the respondent company to discharge the onus placed on it.

[10] I refuse to relax the rule stated in paragraph [13] of *Minister of Police v Gqamane supra* because the issue of the value of property has not been canvassed fully by both sides in the main application. Accordingly, this ground for leave to appeal must also fail.

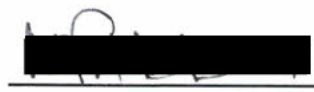
[11] In conclusion, I believe that the appeal would not have a reasonable prospect of success. There is no other compelling reason why the appeal should be heard. The applicant has failed to meet the requirements of section 17(1)(a) of the Superior Courts Act. In the premises, this application must fail.

ORDER

[12] The following order is made.

1. The application for leave to appeal is dismissed.

2. The intervening party is ordered to pay the costs of this application.



MMP Mdalana-Mayisela
Judge of the High Court
Gauteng Division

(Electronically delivered by uploading on Caselines and emailing to the parties)

Date of Judgment: 21 February 2025

Counsel for the Applicant:	Adv N Alli
Instructed by:	J Mthobi attorneys
Counsel for the intervening party:	Adv ME Manala
Instructed by:	Mncedisi Ndlovu & Sedumedi attorneys