IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

CASE NO: 9879/2021P

In the matter between:

THE PRUDENTIAL AUTHORITY **APPLICANT**

and

J[...] P[...] N[...] **FIRST RESPONDENT**

(Identity No. 7[...])

N[...] T[...] N[...] **SECOND RESPONDENT**

(Identity No. 8[...])

(Married to each other in community of property)

ORDER

The following order is granted:

1. The application is dismissed with costs.

JUDGMENT

PIETERSEN AJ:

[1] This is an application for leave to appeal against the whole of the judgment and order handed down on 25 September 2024, in which I dismissed the respondents' application for rescission of the provisional and final orders of sequestration of the joint estate. The respondents in the application for sequestration, Mr J[...] P[...] N[...] and Mrs N[...] T[...] N[...] ('the N[...]'), are married to each other in community of property. The applicant in the application for sequestration was the Prudential Authority ('the Authority') and it fulfils the role of the Registrar of Banks and has the powers and obligations to act in accordance with the provisions of the Banks Act 94 of 1990 ('the Banks Act').

[2] The N[...] seek leave to appeal on the following grounds:

(a) The court erred in its failure to consider the issue of the mistaken date where the N[...]' attorney erred in assuming that the matter was set down for 13 January 2023 and not on 21 November 2022;

(b) The court erred in its failure to consider the direct evidence of Mr N[...] that he was not served with the provisional order and in not finding that the final sequestration order was granted in error;

(c) The court erred in its analysis of the evidence regarding the service of the provisional order on the N[...] and its finding that the N[...] have failed to provide a reasonable explanation for their default in respect of the hearing for the final sequestration order;

(d) The court erred in finding that the N[...] accepted liability for a minimum sum of R129 600 and in its failure to deal with the court order of 7 February 2018, which provides at paragraph 1.2:

'1.2 The applicant may not exercise his power to liquidate assets in terms of section 84 of the Banks Act without the written consent of the Second to Fifth Respondents or an Order from this Honourable Court.'

(e) The court erred in finding that there was actual insolvency in circumstances where, if it is accepted that the amount owing is R129 600, the value of the N[...]' Pinetown property exceeds the actual amount and insolvency was not proved; and

(f) The court erred in its analysis of *Air Treatment Engineering and Maintenance CC v Pat-Con Pharmaceuticals*.[1]

[3] The N[...] submit that there are reasonable prospects that another court could and would come to a different conclusion on appeal and, accordingly, they seek an order granting them leave to appeal to the full bench of this division, or alternatively the Supreme Court of Appeal.

[4] In terms of section 17(1)*(a)* of the Superior Courts Act 10 of 2013 ('Superior Courts Act'), leave to appeal may only be given where the judge concerned is of the opinion that 'the appeal would have a reasonable prospect of success' or if 'there is some other compelling reason why the appeal should be heard'. Prior to the Superior Courts Act, the test to be applied in an application for leave to appeal was whether there were reasonable prospects that another court may come to a different conclusion.[2] However, the position has changed in that section 17(1)*(a)*(i) of the Superior Courts Act provides for leave to appeal to be given only where the judge is of the opinion that 'the appeal would have a reasonable prospect of success'.

[5] The Supreme Court of Appeal held in *S v Smith*[3] that '[m]ore is required to be established than that there is a mere possibility of success, that the case is arguable on appeal or that the case cannot be categorised as hopeless'. Plasket AJA held that there must 'be a sound, rational basis for the conclusion that there are prospects of success on appeal'.[4] This finding in *S v Smith* was again more recently confirmed by the Supreme Court of Appeal in *Four Wheel Drive Accessory Distributors CC v Rattan NO.*[5]

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[1] *Air Treatment Engineering and Maintenance CC v Pac-Con Pharmaceuticals* [2016] ZAKZDHC 34 ('*Air Treatment*').
[2] Section 20 of the Supreme Court Act 59 of 1959 and *Commissioner of Inland Revenue v Tuck* 1989 (4) SA 888 (T) at 890B-C.
[3] *S v Smith* [2011] ZASCA 15; 2012 (1) SACR 567 (SCA) para 7.
[4] Ibid.
[5] *Four Wheel Drive Accessory Distributors CC v Rattan NO* [2018] ZASCA 124; 2019 (3) SA 451 (SCA) para 34.

[6] In *Mont Chevaux Trust v Tim Goosen and others*[6] Bertelsmann J also held that the threshold for granting leave to appeal has been raised in the Superior Courts Act. He found that '[t]he 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'.

[7] The N[...]' explanation for their default of appearance on 21 November 2022, when the provisional order of sequestration was granted, has been dealt with at paragraphs 16 to 20 of the judgment. It was not disputed by the N[...] that the notice of motion contained an unopposed hearing date of 13 January 2022 and that the application papers were accompanied by a notice of set down, enrolling the matter for hearing on 21 November 2022. Both Mr N[...] and his attorney of record overlooked the notice of set down and failed to deliver a notice to oppose. The explanation by Mr N[...] that the decision was made by him and his attorney to wait until Mrs N[...] was served with the application papers before any steps would be taken to oppose the application is not reasonable in the circumstances. It is also apparent from Mr N[...]'s founding affidavit that no further communication regarding the application took place between him and his attorney until the valuators appointed by the trustees contacted him during May 2023.

[8] The N[...]' conduct in failing to instruct their attorney to deliver a notice to oppose and their subsequent failure to contact their attorney regarding any developments in the matter, are not reasonable. The argument that the judgment overlooked the explanation provided regarding the issue of the mistaken date is, therefore, without merit.

[9] Service of the provisional sequestration order is dealt with at paragraphs 21 to 24 of the judgment. It was submitted on behalf of the N[...] that the analysis of the evidence contained in the N[...]' founding affidavit regarding service of the provisional order is wrong. It was submitted by Mr Harrison, who appeared for the N[...], that the court disregarded evidence and overlooked direct evidence indicating that there had not

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[6] *Mont Chevaux Trust v Tim Goosen and others* 2014 JDR 2325 (LCC) para 6.

been personal service on Mr N[...]. Mr N[...]'s evidence regarding the sheriff visiting his personal assistant for purposes of service, according to the visitors' gate book entry, as well as Mr N[...]'s diary entry for 9 December 2022, being the day of service, and his vehicle tracker printout, has been analysed in the judgment with the finding that this evidence is insufficient to disturb the prima facie evidence presented by the sheriff's return indicating personal service of the provisional order on the N[...]. Mr N[...]'s evidence that he was not present at his place of employment and that his vehicle was approximately 1km away but that he cannot recall where he was at the time, is not only vague but also wholly insufficient. The return of personal service was accordingly properly accepted by the court hearing the application for final sequestration and the N[...] failed to provide a reasonable explanation for their default in respect of the hearing for the final sequestration order.

[10] Mr N[...] at no stage denied having received the directive pertaining to the repayment of funds issued by the Registrar of Banks. To the contrary, Mr N[...] invoked the statutory process whereby the directive could be reviewed. Mr N[...] was unsuccessful in this process.

[11] It is further clear from Mr N[...]'s founding affidavit that he does not dispute receipt of the two sums of R43 200 and R86 400 as having been paid by investors into his bank account. The finding at paragraph 28 of the judgment that Mr N[...] accepts the report of the repayment administrator as reflecting a liability in the sum of R129 600 is therefore correct. Regardless, as indicated at paragraph 28 of the judgment, the amount Mr N[...] asserts is outstanding is of no consequence in light of the fact that his review of the directive was dismissed and therefore the amount claimed by the Authority is accepted as correct.

[12] It was also argued on behalf of the N[...] that the court erred at paragraph 25 of the judgment in finding that the N[...] did not suggest that the court granted the provisional and final sequestration orders in error. This argument is also without merit. The N[...] placed no reliance on the provisions of rule 42 of the Uniform Rules of Court

in support of the rescission application and no reference was made to this rule or the requirements of the rule. There was no suggestion by Mr N[...] that the court made an error when granting the provisional and final sequestration orders or that there was any mistake or ambiguity in relation to the court orders granted.

[13] The N[...]' reliance on the court order of 7 February 2018 is also misplaced. The court order only deals with the applicant exercising its powers in terms of section 84 of the Banks Act, whereas the Authority issued a directive in terms of section 83 of the Banks Act, which Mr N[...] failed to comply with and therefore constituted an act of insolvency. The Authority was therefore entitled to rely on the N[...]' deemed act of insolvency alone in terms of section 83(3)*(b)* of the Banks Act, without any recourse to section 84.[7] The submission by Mr Smit SC, who appeared for the Authority, that upon the N[...]' unsuccessful review of the directive it became unassailable, is therefore correct. The N[...]' argument that the judgment contained an incorrect analysis of their liability is therefore without merit.

[14] The repayment administrator indicates in his report that Mr N[...] unlawfully obtained the sum of R1 125 323 and that he owns an immovable property valued at R1 380 000, with an encumbrance over the property in the form of a bond in favour of Nedbank in the outstanding sum of approximately R680 000. The conclusion is thus drawn by the Authority that there is sufficient advantage to creditors for the N[...]' joint estate to be sequestrated.

[15] There is also no merit in the N[...]' argument regarding the facts in *Air Treatment* being incorrectly distinguished from the facts herein. The court hearing the application for sequestration during 2022 and 2023 had before it the draft solvency report of November 2016, as supplemented and updated to 30 October 2020 in terms of annexure 'FA4' to the founding affidavit in the sequestration application. Whilst the municipal valuation in respect of the N[...]' immovable property stems from 2016, it only served before the court to establish an advantage to creditors and can be distinguished

[7] *Prudential Authority v Dlamini and another* [2024] ZASCA 133 para 30.

from *Air Treatment,* where Masipa J dealt with a statutory notice in terms of section 345 of the Companies Act 61 of 1973, which was three years old. The facts in *Air Treatment* were therefore correctly distinguished from the facts herein.

[16] It remains that the N[...] have not challenged the judgment where it was found that the application for rescission was not bona fide made due to their failure to make a full and complete disclosure of their assets, liabilities, income, and expenditure as well as their failure to disclose the unsuccessful review of the directive.

[17] As a result, I am unable to find that an appeal would have a reasonable prospect of success. The application therefore fails.

[18] The following order is made:

1. The application is dismissed with costs.

PIETERSEN AJ

Date of hearing:	27 November 2024
Date of Judgment:	13 December 2024

APPEARANCES

The Prudential Authority:	Mr JE Smit SC
Instructed by:	**Werksmans Attorneys** E-mail: lsilberman@werksmans.com Ref: L Silberman/SOUT3267/246 **c/o Stowell & Co** 295 Pietermaritz Street Pietermaritzburg

Tel: 033 845 0500
E-mail: zeldas@stowell.co.za
(Ref: PL Firman/WER/0065)

Mr and Mrs N[...]:

Mr G Harrison

Instructed by:

Henwood Britter & Caney Attorneys
Tel: 031 304 3621
E-mail: rbd@henwoodbritter.com
Ref: Mr. R.B. Donachie
c/o Tatham Wilkes Inc
Office F008, First Floor
Athlone Circle
1 Montgomery Drive
Pietermaritzburg
Tel: 033 345 3501
E-mail: ureesha@tathamwilkes.co.za
(Ref: U Premduth/MP/15U021923)