REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

(1) REPORTABLE: No
(2) OF INTEREST TO OTHER JUDGES: No

6/4/2021
DATE SIGNATURE

Case No.: 16017/2020

In the matter between:

THE FINANCIAL SECTOR CONDUCT AUTHORITY Applicant

and

J P MARKETS SA (PROPRIETARY) LIMITED Respondent

JUDGMENT

Gilbert AJ

1. The respondent seeks to appeal the whole of my judgment and order delivered on 7 September 2020 placing the respondent under final winding-up in terms of section 38B of the Financial Advisory and Intermediary

Services Act, 37 of 2002 ("FAIS") and section 96 of the Financial Markets Act, 19 of 2012 ("FMA") with ancillary relief.

2. Although soon after the delivery of the application for leave to appeal, arrangements were commenced for the hearing of the application, the respondent applied to another court for an order placing it under supervision and commencing business rescue proceedings. The parties requested that the application for leave to appeal not be heard until the outcome of the business rescue proceedings. I am informed by counsel that the application for business rescue was dismissed and that the respondent now wishes to persist with its application for leave to appeal. This explains the delay from September 2020 until now.

3. The respondent identified in its application for leave to appeal as well as in its heads of argument various aspects in respect of which it submits that I erred and that accordingly I should came to the opinion that an appeal would have a reasonable prospect of success as envisaged in section 17(1)(a)(i) of the Superior Courts Act, 2013. Challenged are both my legal findings as to the interpretation and application of the relevant sections of and interplay between the FMA, FAIS and the Companies Act, 2008 and my factual findings.

4. My judgment is comprehensive and is fully reasoned in relation to each of these aspects that the respondent submits constitute errors. I specifically enquired from the respondent's counsel whether there was any particular error that I had made and which features as a ground of appeal in relation to

something that I had not reasoned, such as whether I had overlooked some or other aspect or feature but which when brought to light would demonstrate that an appeal would have a reasonable prospect of success. Other than a minor ancillary issue which would in my view not have affected the outcome,[1] the challenges to my judgment are not so much that I made an error in any patent form but that there is a reasonable prospect that another court would come to a different decision on those issues in respect of which I had made reasoned findings.

5. It is now settled that the threshold for the granting of leave to appeal under section 17(1)(a)(i) is higher than what it was under the previous Supreme Court Act, 1959. The Supreme Court of Appeal, for example in *Notshokovu v S* [2016] ZASCA112 (7 September 2016) in paragraph 2 stated that an appellant "*faces a higher and stringent threshold, in terms of the present Superior Courts Act compared to the provisions of the repealed Supreme Court Act".* To similar effect is *Acting National Director of Public Prosecutions and others v Democratic Alliance in re: Democratic Alliance v Acting National Director of Public Prosecutions and others*[2] where the Full Bench held that the Superior Courts Act had "*raised the bar for granting leave to appeal*",

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[1] The respondent contends that I erred in considering as a factor to be taken into account in deciding whether to grant a winding-up order the availability of section 26 of the Insolvency Act, 1936 to set aside transactions that may be void as the winding-up application was not brought on the basis that the respondent was unable to pay its debts. Apart from this factor not being decisive to the outcome, it may be that the correct legal position is not whether the respondent was wound up because of an inability to pay its debts, but whether the respondent is able to pay its debts when the section is invoked: see the commentary in *Henochsberg on the Companies Act 71 of 2008* LexisNexis, October 2020 – SI24, at APPI - 16(1) and (2)

[2] [19577/09] [2016] ZAGPHC489 (24 June 2016), at para 25.

referring with approval to the following passage from the judgment of Bertelsmann J in *Mont Chevaux Trust v Goosen*[3]:

> "*It is clear that the threshold for granting leave to appeal against the 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.*"

6. Notwithstanding the difficulties in appreciating what the contours are of the now more stringent test and applying those in any particular instance, I must proceed on the basis of binding precedent that a greater measure of certainty of prospects of success on appeal is required than was previously the case.

7. I am unpersuaded that such errors as have been raised by the respondent enable me to form the opinion that an appeal would have a reasonable prospect of success.

8. But there is an alternate ground on which leave to appeal can be granted, namely if I am "*of the opinion that – (ii) there is some other compelling reason*

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[3] 2014 JDR 2325 (LCC).

why the appeal should be heard, including conflicting judgments on the matter under consideration".

9. Counsel were agreed in their submissions that even should I form the opinion that an appeal would not have a reasonable prospect of success, it was still incumbent upon me to consider whether leave to appeal should nevertheless be granted because there is some other compelling reason. This is so as the Supreme Court of Appeal has made this clear, including in the recent decision of *Caratco (Pty) Limited v Independent Advisory (Pty) Limited* 2002 (5) SA (SCA) which featured prominently in argument before me:

> "*In order to be granted leave to appeal in terms of s 17(1)(a)(i) and s 17(1)(a)(ii) of the Superior Courts Act an applicant for leave must satisfy the court that the appeal would have a reasonable prospect of success or that there is some other compelling reason why the appeal should be heard. If the court is unpersuaded of the prospects of success, it must still enquire into whether there is a compelling reason to entertain the appeal.*"[4]

10. In the circumstances, I am obliged to consider whether there is some other compelling reason to grant leave to appeal.

11. The Supreme Court of Appeal in *Caratco*[5] held that a compelling reason includes "*an important question of law or a discreet issue of public*

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[4] In para 2.
[5] In para 2.

importance that will have an effect on future disputes" but that "*here too, the merits remain vitally important and are often decisive*". In that matter the SCA was not particularly impressed with the arguments made on behalf of the applicant for leave to appeal, finding them unmeritorious and extraordinary, and that in the circumstances of that case the issue that the applicant for leave to appeal put forward as one of importance was found not to constitute a compelling reason for leave to appeal to be granted.

12. Nonetheless, it is clear from the judgment that an important question of law or discreet issue of public importance may but not necessarily will constitute a compelling reason.

13. In an earlier decision of *Minister of Justice and Constitutional Development and others v South African Litigation Centre and others* 2016 (3) SA 317 (SCA) the Supreme Court of Appeal found that a compelling reason would be that a new basis could be raised on appeal which was not raised and addressed by the lower court and that this may, at least in certain circumstances, constitute a compelling reason.

14. In the present instance, there is no suggestion that some or other issue that was not raised before me would be advanced and argued on appeal. The respondent intends arguing the appeal on the same grounds that it placed before me but seeking to persuade the appeal court to come to a different conclusion.

15. But *Minister of Justice v SALC* further provides that where "*an issue of public importance*" features, that is to be taken into account when considering

whether there is some other compelling reason why the appeal should be heard. The SCA cautioned though[6] that merely because the High Court decides an issue on public importance it does not follow that it must grant leave to appeal, as the merits of the appeal remain vitality important and will often be decisive.

16. The respondent in its heads of arguments on leave to appeal submit that the novelty of the issues is a compelling reason why the appeal should be heard. Unsurprisingly the respondent refers to paragraph 2 of my judgment:

> "*The application raises issues that are* res nova *in that neither counsel for the parties were able to refer me to any authorities in relation to these two sections nor was I able to find any. The issues that arise relate both to the interpretation of these sections and the application of those sections to the facts.*"

17. But as Mr Theron SC for the applicant (in the main application), points out, mere novelty is insufficient to constitute a compelling reason. *Caratco* is an example as the novel issue to be decided in that matter was whether section 143 of the Companies Act, 2008 that dealt with the remuneration of a business rescue practitioner impliedly prohibited a success fee if the company was successfully rescued where that success fee was paid by a

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[6] In para 24.

third party. That issue, although novel, was found not to justify leave to appeal. Something more is required.

18. That something more, Mr Muller SC (assisted by Ms Long) submits is that the matter is of public importance as it has far reaching consequences for the respondent, as well as other businesses with the same business model as the respondent operating within the relevant industry and that accordingly my interpretations of the relevant provisions of the various legislation has substantial industry-wide implications. Mr Theron SC's response is that many judgments have a wide effect on a range of persons, particularly where the court engages in an exercise of statutory interpretation, and that this does not constitute some other compelling reason why an appeal should be heard.

19. I have carefully considered whether there is some other compelling reason why an appeal should be heard while being conscious of not succumbing to hubris that my judgment is unassailable on appeal, albeit that a higher threshold is now required for leave to appeal to be granted on the merits. There were many facets to the respective parties' arguments and the issues are of considerable complexity, as is demonstrated by the length of my judgment.

20. What has swayed me to find that there is some other compelling reason why the appeal should be heard is that my judgment does operate in a regulatory environment and more particularly the regulation of the unlicensed conducting of the business of an OTC derivative provider, and how that is advanced by granting a winding-up order.

21. I state as follows in my judgment:

> *"215. I do not intend setting a precedent that wherever a service provider is unlicensed it is to be placed under winding-up in terms of either of the two sections. Each case must be considered on its merits. As appears above, it is not only the failure of the respondent to have been licensed to conduct the business of an OTC derivative provider but also the other factors that I have described above that persuade me that a winding-up order is to granted. To the extent that my findings may have a broader effect on the regulation of the unlicensed conducting of the business of an OTC derivative provider, particularly given the assertions that the others may similarly be conducting such unlicensed business, each case would have to be considered on its own merits.*
>
> *216. Nonetheless section 96 of the FMA expressly refers to a winding-up to achieve the objects of that Act and section 38B of the FAIS Act similarly provides that the court may take into account whether the liquidation of a respondent is reasonably necessary for the integrity and stability of the financial sector. To the extent that this judgment may advance the regulation of the business of a OTC derivative provider, then that is a factor to be taken into account when deciding whether to grant a liquidation order. This court is specifically empowered, if not enjoined by the FMA and the FAIS Act, to consider interests wider than those of the respondent such as for the integrity and stability of the financial sector as a whole."*

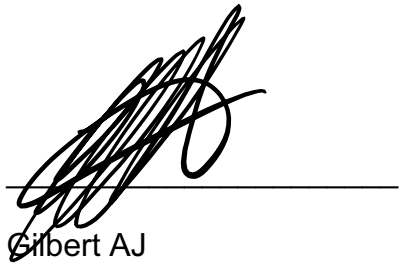
22. Given that I found that I am specifically called upon to look at interests beyond those of the respondent, which include the integrity and stability of the financial sector, I am of the opinion that there is some other compelling reason why the appeal should be heard, as provided for in section 17(1)(a)(ii). My judgment operates not only in relation to the other OTC derivative providers who are apparently also unlicensed but also the many thousands of customers that transact with those traders.

23. Counsel were agreed in their submissions that should leave to appeal be granted, it be granted to the Supreme Court of Appeal. Should I have erred, in relation to my interpretation and application of the various legislation, then I would have erred in respect of a question of law, and which is one of importance because of its general application. An appeal to the Supreme Court of Appeal is therefore warranted as provided for in section 17(6)(a) of the Superior Courts Act.

24. An order is granted as follows:

    24.1. The respondent in the main application is granted leave to appeal to the Supreme Court of Appeal.

    24.2. The costs of the application for leave to appeal are costs in the appeal.



Gilbert AJ

Date of hearing:	30 March 2021
Date of judgment:	6 April 2021
For the Applicant:	E Theron SC
Instructed by:	Mamatela Attorneys Inc, Johannesburg
For the Respondent:	J Muller SC and P R Long
Instructed by:	Hanekom Attorneys, Cape Town