

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA  
(NORTH GAUTENG HIGH COURT, PRETORIA)

Case No 62712/2021

DELETE WHICHEVER IS NOT APPLICABLE  
(1) REPORTABLE: YES / NO.  
(2) OF INTEREST TO OTHER JUDGES: YES / NO.  
(3) REVISED.

DATE ; 29/06/2022

SIGNATURE:

A handwritten signature in blue ink, appearing to be "M K", is written over a horizontal line.

In the Matter between:

Ben Venter

First Applicant

and

M K Africa Plant and Equipment Pty (Ltd)

Respondent

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JUDGMENT ON LEAVE TO APPEAL

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Maumela J.

1. This is an application for leave to appeal which is opposed. The judgment against which this application for leave to appeal is brought provided for the following order:
  - 1.1. That the application is ordered to be heard as an urgent application in terms of rule 6 (12) of the rules of this court and Applicant's non-compliance with the applicable time-periods under rules pertaining to service is condoned.
  - 1.2. That the Respondent company, ("MK AFRICA PLANT AND EQUIPMENT PTY (LTD")", be placed under supervision and business rescue proceedings in terms of section 131 (4) of the Companies Act 2008: (Act No: 71 of 2008) – The Act.
  - 1.3. That Gideon Slabbert be appointed as Interim Business Rescue Practitioner as intended in section 131 (5) of The Act, pending ratification of such appointment by the creditors at their first meeting and
  - 1.4. That the Respondent be ordered to pay the cost of this application on a scale as between Attorney and Client.

#### BACKGROUND.

2. On the 9<sup>th</sup> of December 2021, the Respondent launched an urgent application, seeking final relief, in terms of Section 163 of the 2008 Companies Act ("*the Act*"). Argument was heard was heard on on the 22<sup>nd</sup> of December 2022. Relief was granted on the 24<sup>th</sup> of January 2022. Henceforth, the parties will be referred to in these heads as they were before the Court *a quo*.
3. The order made on the 24<sup>th</sup> of January 2022 rendered M K Africa Plant and Equipment Pty (Ltd to be under business rescue. Gideon Slabbert was appointed as interim business rescue practitioner as intended in section 131(5) of the Companies Act, with all the powers and duties entrusted to him in terms of the Act, pending ratification of such appointment by the creditors at their first meeting.
4. For purposes of these proceedings, the parties will be referred to as they were in the application for business rescue, ie the Applicant; Ben Venter, and the Respondent, MK Africa Plant and

Equipment. Before the court *a quo*, the Respondent was ordered to pay the costs of the application on a scale as between attorney and client. Leave to appeal against the above order is sought. The application for leave to appeal is defended.

5. The Applicant points out that the purpose of business rescue and the mechanisms as provided for in Chapter 6 of the Companies Act 71 of 2008 (Companies Act) got undermined where an application for leave to appeal was brought. The Applicant makes the point that should leave to appeal be granted, the result will become academic as the Company would in all probability be liquidated.
6. The Applicant submits that it is against this background that the Court should specifically consider the overly technical points that the Respondent has taken in an attempt to persuade the Court to grant leave to appeal. The Court already found that Mr. Venter misstated the affairs of the Company and made unfounded allegations of agreements with the creditors of the Company.<sup>1</sup>
7. Section 17(1) of the Superior Courts Act, Act 10 of 2013. ("the Superior Courts Act"), regulates applications for leave to appeal. In that regard, this section provides as follows:  
*'(1). Leave to appeal may only be given where the judge or judges concerned are of the opinion that-*
  - (a). (i). the appeal would have a reasonable prospect of success; or*  
*(ii), there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;*
  - (b). the decision sought on appeal does not fall within the ambit of section 16(2)(a); and*
  - (c). where the decision sought to be appealed does not dispose of all the issues in the case, the appeal would lead to a just and prompt resolution of the real issues between the parties.'*
8. Regarding the threshold for purposes of leave to appeal, Plaskett AJA, as he then was, wrote the following in the judgment, in which Cloete JA and Maya JA, as she then was, concurred, in *S v Smith*<sup>2</sup>, at paragraph 7: *"What the test of reasonable prospects of success postulates is a dispassionate decision, based on the facts and the*

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<sup>1</sup>. Paragraph 24 of the Judgment.

<sup>2</sup>. 2012 (1) SACR 567 (SCA) ([2011] ZASCA 15).

*law that the Court of Appeal could reasonably arrive at a conclusion different to that of the trial court. In order to succeed, therefore, the appellant must convince this Court on proper grounds that he has prospects of success on appeal and that those prospects are not remote, but have a realistic chance of succeeding. More 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 categorized as hopeless. There must, in other words, be a sound, rational basis for the conclusion that there are prospects of success on appeal.”*

9. In the case of *Month Chevaux Trust v Goosen*<sup>3</sup> at para 6, Bertelsman J held as follows: *“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*<sup>4</sup> *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 he sought to be appealed against”*
10. In the case of *Acting National Director of Public Prosecutions and Others v Democratic Alliance In Re: Democratic Alliance v Acting National Director of Public Prosecutions and Others*<sup>5</sup>, the Full Bench of this Division, after citing the *The Mont Chevaux Trust* passage, stated as follows at paragraph 29: *“When the Court deals with an application for leave to appeal, leave may only be given if we are of the opinion that the appeal would have reasonable prospects of success...”*
11. It is trite that the Respondent bears the duty show that this appeal incumbent has a more than reasonable prospect of success and that another Court would come to a different conclusion. The Respondent also has to show that there are compelling reasons for leave to appeal to be granted.

#### **GROUND OFS OF APPEAL.**

12. The Respondent submits that the first ground of appeal deals with the peremptory requirements regarding service of an application seeking to place a company in business rescue. It argues that such an order affects the status of the company and due and proper notice has to be given to the body of affected persons (creditors, shareholders and employee as defined in Section 128

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<sup>3</sup>. 2014 JDR 2325 (LCC).

<sup>4</sup>. 1985 (2) SA 342 (c).

of the Act).

13. The Respondent submitted that there were various ‘known creditors’ who were not given due and proper notice of the application. It made the point that the authorities clearly require that on this basis alone, the application should have been dismissed with costs. It referred to Section 131 of the Act which provides as follows:

*“Court order to begin business rescue proceedings*

*(1). Unless a company has adopted a resolution contemplated in section 129, an affected person may apply to a court at any time for an order placing the company under supervision and commencing business rescue proceedings.*

*(2). An applicant in terms of subsection (1) must—*

*(a). serve a copy of the application on the company and the Commission; and*

*(b). notify each affected person of the application in the prescribed manner.’*

The use of the word ‘*must*’ in section 131(2) is indicative of the peremptory nature of the provisions.

14. The Respondent pointed out that in the case of *Engen Petroleum Ltd v Multi Waste (Pty) Ltd and Others*<sup>6</sup>, the Court considered the notification requirements in terms of regulation 124 and at paragraph 24 said the following: *“at the very least it is incumbent upon an applicant to demonstrate that all reasonable steps have been taken to establish the identity of the affected persons and their addresses to which the relevant notices are to be delivered”*. In *Taboo Trading 232 (Pty) Ltd v Pro Wreck Scrap Metal CC and Others*<sup>7</sup> the Court, at paragraph 11, said: *“The purpose of the notification required by s 131(2)(b), is to facilitate participation in terms of s 131(3), by affected persons in the hearing of the business rescue application. Creditors, being affected persons, in the business rescue application, also have a material interest in the liquidation proceedings. In my view, it is implicit in ss 131(2)(b) and 131(3), that reasonable notification must be given to affected persons. Short notice which renders participation in the hearing impossible, cannot be regarded as due compliance with s 131(2)(b). There is a strong policy justification for interpreting these provisions in a way which would not facilitate a dilatory or supine approach by an applicant in business rescue proceedings. Service of a copy of the application on the Commission, and notification of each affected person, are not merely procedural steps. They are substantive requirements, compliance with which is an integral part of the making*

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<sup>6</sup>. 2012 (5) SA 596 (SG).

<sup>7</sup>. 2013 (6) 141 (KZP)

of an application for an order in terms of s 131(1) of the Companies Act”.

15. It was submitted that Section 131(2)(b) of the Act contains a mandatory provision that all affected persons should be notified. The Respondent argues that this is not just a procedural step but a substantive requirement. It points out that it is evident from the Respondent’s own service affidavit and application that there were multiple known creditors who were either not properly notified or not even notified at all. It is argued that if another court considers the numerous creditors who were known to the applicant at the time when the application was launched, who did not receive notice of the application, it will find that the application should have been dismissed on this basis alone, with costs.
16. The second ground of appeal relates to the factual dispute whether or not the applicant actually had *locus standi* to seek the relief. It was submitted that it was not the applicant’s case that he is an “*affected person*”, as defined in Section 128 of the Act. Sole reliance was placed on his alleged position as director of the company. It was submitted that the high-water mark of the Applicant’s evidence was a CIPC search but this, at best for the Applicant, present a *prima facie* case only.
17. The Respondent points out that he disputed this, based on objective evidence and no less than three confirmatory affidavits were submitted in which it was averred that the Applicant was *de facto* a director of the Respondent. In the case of *National Director of Public Prosecutions v Zuma*<sup>8</sup> the SCA held at paragraph 26 that: “*motion proceedings, unless concerned with interim relief, are all about the resolution of legal issues based in common cause facts. Unless the circumstances are special, they cannot be used to resolve factual issues because they are not designed to determine probabilities*”.
18. The Respondent submitted that in the matter of *Plascon – Evans Paints Limited v Van Riebeeck Paints (Pty) Ltd*<sup>9</sup> the Appellate Division, as it then was, held as follows: “*the affidavits reveal certain disputes of fact. The appellant nevertheless sought a final interdict, together with ancillary relief, on the papers and without resort to oral evidence. In such a case the general rule was stated by Van Weike J (with whom De Villiers J P and Rosenow J Concore). In Stellenbosch Farmers Wine Limited*

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<sup>8</sup>. 2009 (2) SA 277 (SCA).

<sup>9</sup>. 1984 (3) SA 623 (A) 634 E-635 D.

*v Stellenvale Winery (Pty) Ltd*<sup>10</sup>; “where there is a dispute as to the facts a final interdict should only be granted in notice of motion proceedings if the facts are stated by the respondent together with the admitted facts in the applicant’s affidavits justify such an order...”

19. The Respondent argues that in this case, the Court was confronted with an irreconcilable dispute of fact on the papers whether or not the Applicant is in actual fact a director of the Respondent. He contends that absent a request for the matter to be referred to oral evidence and absent any finding that the dispute of fact is clearly farfetched and untenable, the application should either have been dismissed on the basis that the dispute of fact was foreseeable alternatively, it should have been resolved in favour of the Respondent; that is, on the basis that the Applicant is not a director of the Respondent.
20. The Respondent submitted that there is a reasonable prospect that another Court would have dismissed the application on this score, with costs. The third and fourth ground of appeal is that, the Court erred by mainly adjudicating the matter within the confines of Chapter 6 of the Act. In other words, the Court, accepting that the Applicant is a director of the company, then mainly considered whether or not the Respondent was financially distressed.
21. On that basis, the Respondent submits that the first port of call should have been a determination whether or not the alleged prejudicial conduct referred to in the founding affidavit, actually constitutes unfair, oppressive or unreasonable conduct in order to engage the jurisdiction of Section 163 of the Act. In the original heads of argument, the authorities make it clear that a Court is slow to interfere with the management of a company and mere disputes or loss of confidence between directors do not equate to oppressive or unreasonable conduct. To the extent that the Court dealt with certain oppressive conduct in terms of Section 163 of the Act, the Respondent submits that there was a mistake in fact as well.
22. The Respondent argues that in line with the decision in the *Grancy*, there is a reasonable prospect that another court could

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<sup>10</sup>. 1957 (4) SA 234 (C) at 235 E-G.

have found that the allegations by the Applicant do not amount to oppressive conduct in terms of Section 163(1) of the Act, and absent this jurisdictional pre-requirement being met, the enquiry should have stopped there, and the application should have been dismissed with costs.

23. Ground 5 deals with the proposition that before the Court could consider whether or not the Respondent was financially distressed, the court was obliged to firstly consider whether or not business rescue is appropriate to remedy the alleged oppressive conduct, (assuming for the moment that there was proper service, the Applicant had *locus standi* and there was prejudicial conduct in terms of Section 163(1) of the Act). If the Court concluded that the business rescue was not causally connected to, or was not appropriate to remedy, the alleged oppressive conduct, the application should have been dismissed with costs.
24. It was pointed out that Ground 6A and 6B boils down to the submission that the Court *a quo*, applied the incorrect test alternatively, not the complete test when it placed the Respondent into business rescue. It was argued that the first requirement is about whether or not the Respondent is financially distressed which is a factual question which has to be proved in the founding affidavit, within the confines of the *Plascon Evans* decision if there are factual disputes. The second requirement is the adjudication on whether or not, objectively viewed based on the facts in the founding affidavit, there is a reasonable prospect that the company can be rescued. This is about whether the company can be traded back to solvency which is what is regarded as the primary goal. The secondary goal has to do with whether a better dividend for creditors can be secured.
25. In that regard, the Respondent submits that the test for 'financially distressed' was incorrectly applied by the Court *a quo* based on outdated authority<sup>11</sup>. Secondly, the Respondent submits that the Court did not consider, at all, whether or not there is a reasonable prospect that either of the two goals of business rescue can be achieved, based on facts set out in the founding affidavit.<sup>12</sup> The Respondent also submitted that another court, considering the aforementioned, would have come to the conclusion that the

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<sup>11</sup>. See CaseLines 014 – 18, PA 67 – 71.

<sup>12</sup>. See CaseLines 014 – 20, PA 72 – 84.



founding affidavit fell woefully short of meeting the jurisdictional pre-requirements for business rescue and would have dismissed the application.

26. The Respondent stated that the seventh ground pertains to the fact that the Applicant did not approach the court with clean hands.<sup>13</sup> The respondent alleged that the applicant was the cause of the breakdown in the relationship between the parties and secondly, also the reason why the respondent had historical debts. The Respondent in essence alleges that the applicant mismanaged the affairs of the respondent and whilst in breach of a contractual obligation not to compete unlawfully, or to have a competing interest, to that of the respondent. Notwithstanding the aforementioned, the applicant acted to the detriment of the respondent.
27. The Respondent submits that in the exercise of the its discretion; if another court takes this into account, whether or not there is prejudicial, unfair or unreasonable conduct or alternatively whether or not business rescue should be granted; such other court will conclude that the order should not have been granted as the Applicant would be benefitting from a situation he himself created to the detriment of the Respondent. He also respectfully submitted that there are compelling reasons why leave to appeal should be granted in terms of Section 17 (1)(a)(ii) of the Superior Courts Act.
28. The Respondent submits that even if the Court is not persuaded about prospects of success, it must still enquire whether or not there are compelling reasons for the appeal to be heard. According to the Respondent, compelling reasons exist if the decision sought to be appealed against involves an important question of law or where the issues are of public importance and have potential to affect future matters. He contends that it is so that in this matter the issues at hand have potential to affect future matters.
29. The Respondent contends that in this matter, there are two main considerations why the appeal should be heard. Firstly, the proposition whether or not an applicant launching an application

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<sup>13</sup>. Case Lines 014 – 25, PA 85 – 88.

premised in terms of Section 163 of the Act, is entitled to make direct reliance on Chapter 6 of the Act; if one accepts that the company is financially distressed; when the applicant fails to meet the jurisdictional pre-requirements in terms of Section 163 of the Act. Secondly, in the context of these proceedings, if a Court is faced with a director who is not an employee of a company who seeks business rescue, the question is to be answered if the legislator intended that a fourth class of “affected person” be recognised to the interpretation of Section 163 and Chapter 6 of the Act.

30. Based on the above, the Respondent submits that reasonable prospects exist on the basis of which another court may come to a different conclusion. It also contends that there are compelling reasons why the appeal should be heard. The respondent submits that in the event where the application succeeds, the standard order insofar costs are concerned should be granted namely that costs be ordered to be costs in the appeal.
31. The Applicant pointed out that in the matter of *The Mont Chevaux Trust v Tina Goosen & 18 Others*<sup>14</sup> his Lordship Justice Bertelsmann stated as follows pertaining to the test to be applied in leave to appeal: *“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 Cornwright & Others.*<sup>15</sup> *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.’*
32. It was submitted that the “new” statute now requires of an applicant to show that there is a reasonable prospect of success that another court will come to a different finding.

#### **GROUNDS RELIED UPON FOR LEAVE TO APPEAL. (THE FIRST GROUND OF APPEAL.)**

33. The Respondent’s First ground of appeal has to do with non-compliance with section 131(2) of the Companies Act, Act 71 of 2008 (“the Act”). In the case of *Engen Petroleum Ltd v Multi Waste (Pty) Ltd and others*<sup>16</sup> his Lordship Boruchowitz dealt with

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<sup>14</sup>. 2014 JDR 2325 (LCC) at paragraph [6].

<sup>15</sup>. 1985 (2) SA 342 (T) at 343H.

<sup>16</sup> 2012 (5) SA 596 (GSJ).

the requirements of section 131(2) of the Act and stated as follows:

*[19]. Section 131(2)(b) provides that an applicant must "notify" each affected person of the application "in the prescribed manner". The Act and Companies Regulations, 2011, published under GN R351 in GG 34239 of 26 April 2011, specifically provide how notification is to be given to affected persons.*

*[24]. An applicant must satisfy the court that all reasonable steps have been taken to notify all affected persons known to the applicant, by delivering a copy of the court application to them in accordance with regulation 7. Where compliance proves impossible, an applicant may apply to the High Court for an order of substituted service (see regulation 7(3)). At the very least it is incumbent upon an applicant to demonstrate that all reasonable steps have been taken to establish the identity of the affected persons and their addresses to which the relevant notices are to be delivered. Where electronic means, such as a fax machine, is used to give notice, evidence is required of the information stipulated in regulation 7(4).*

34. In the founding affidavit under paragraph 56 the Applicant stated as the following:

*[56]. Furthermore, my attorneys of record will ensure that a copy of this application is served on the following known creditors of the respondent:*

- 34.1. Burma Plant Hire;*
- 34.2. Case Hire CC;*
- 34.3. Jet Plant Hire;*
- 34.4. Silver Coin Trading (Pty) Ltd t/a Marmac Mining;*
- 34.5. Rail Plant Hire (Pty) Ltd;*
- 34.6. Riviera Hire (Pty) Ltd;*
- 34.7. Road Master Mining Division (Pty) Ltd;*
- 34.8. Viviers Transport and*
- 34.9. Equipment Spare Parts Africa (Pty) Ltd".*

35. The applicant points out that in response, the Respondent did not challenge and/or allege any further creditors and merely stated that the following:

*[33.1]. I note these allegations.*

*[33.2]. The respondent reserves its right to argue, should it be the case, that the applicant failed to notify all affected persons*

of this application.”<sup>17</sup>

36. The Applicant argues that it is trite that a deponent is under a duty to admit or deny or to confess and avoid a direct allegation. He points out that a reply that the allegations are “taken note of” would, in the circumstances amount to an admission.<sup>18</sup> He argues that by “noting” the allegations in the founding affidavit, the Respondent has admitted that the applicant only needed to serve the application on the creditors as is listed. He charges that the Respondent opportunistically seeks to reserve its right to argue the point, whereas it, the Respondent, already admitted that those are the relevant affected persons.
37. It is submitted that the Applicant thereafter served the application on all the affected persons as listed in paragraph 56. He points out that it is further important to emphasise that the Applicant, and in the notice of motion, specifically stated all of the addresses on which it is to serve the application, including all the known creditors. Despite this, the Respondent did not under oath object and say to the Court that this amounts to short service. On that basis, the Applicant argues that the Respondent’s first ground of appeal stands to fall because the Respondent admitted that the relevant creditors stand listed as creditors as is reflected in paragraph 56.

#### THE SECOND GROUND OF APPEAL.

38. The second ground of appeal relied upon relates thereto that, according to the Respondent, Court ought to have found that there is a factual dispute that cannot be resolved on the papers. The alleged dispute pertains to the allegation by the Respondent in the answering papers that the applicant is not a director of the Respondent company.
39. The Applicant referred to the case of *National Director of Public Prosecutions v Zuma*<sup>19</sup> where Harms DP observed that motion proceedings were really designed for the resolution of legal disputes, based on common cause facts. In most applications, however, disputes of fact, whether minor or more substantial,

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<sup>17</sup>. See section 003-48 to 49.

<sup>18</sup>. *McWilliams v First Consolidated Holdings (Pty) Ltd* 1982 (2) SA 1 (A) at 10E – D; *Makhuvu And Others v Lukoto Bus Service (Pty) Ltd And Others* 1987 (3) SA 376 (V) at 386C - G

<sup>19</sup>. *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) para 26

arise. As a result, rules have been developed to determine the facts upon which matters must be decided where disputes of fact have arisen and the parties do not want a referral to oral evidence or trial.

40. The approach to disputes of fact when interim relief is sought differs from that when final relief is sought. In effect, the former situation is the obverse of the latter situation.<sup>20</sup> In proceedings for final relief, the approach to determining the facts was authoritatively set out by Corbett JA in the case of *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*<sup>21</sup> as follows: “It is correct that, where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order. The power of the Court to give such final relief on the papers before it is, however, not confined to such a situation. In certain instances, the denial by respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or bona fide dispute of fact . . . If in such a case the respondent has not availed himself of his right to apply for the deponents concerned to be called for cross-examination under Rule 6(5)(g) of the Uniform Rules of Court . . . and the Court is satisfied as to the inherent credibility of the applicant's factual averment, it may proceed on the basis of the correctness thereof and include this fact among those upon which it determines whether the applicant is entitled to the final relief which he seeks . . . Moreover, there may be exceptions to this general rule, as, for example, where the allegations or denials of the respondent are so far-fetched or clearly untenable that the Court is justified in rejecting them merely on the papers...”
41. In other words, generally speaking, in motion proceedings in which final relief is sought, factual disputes are resolved on the papers by way of an acceptance of those facts put up by an applicant that are either common cause or are not denied as well as those facts put up by the respondent that are in dispute. The rule applies ‘generally speaking’ because there are exceptions to it, as already alluded to by Corbett JA. These are instances where despite denials by a Respondent, no real, genuine or *bona fide* dispute of fact can be said to have been created.

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<sup>20</sup>. As to the former, see for example, *Webster v Mitchell* 1948 (1) SA 1186 (W) at 1189; *Gool v Minister of Justice & another* 1955 (2) SA 682 (C) at 688C-F; *Spur Steak Ranches Ltd & others v Saddles Steak Ranch, Claremont & another* 1996 (3) SA 706 (C) at 714E-F.

<sup>21</sup>. *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634H-635C.

42. Harms DP said, in *National Director of Public Prosecutions v Zuma*,<sup>22</sup> that the general rule may not apply ‘if the Respondent’s version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, farfetched or so clearly untenable that the court is justified in rejecting them merely on the papers’. In the case of *Wightman t/a JW Construction v Headfour (Pty) Ltd & another*<sup>23</sup> Heher JA dealt with how courts should decide on the adequacy of a Respondent’s denial in motion proceedings for purposes of determining whether a real, genuine or *bona fide* dispute of fact had been raised.
43. In that regard, the judge stated: “
- [11]. *The first task is accordingly to identify the facts of the alleged spoliation on the basis of which the legal disputes are to be decided. If one is to take the respondents’ answering affidavit at face value, the truth about the preceding events lies concealed behind insoluble disputes. On that basis the appellant’s application was bound to fail. Bozalek J thought that the court was justified in subjecting the apparent disputes to closer scrutiny. When he did so he concluded that many of the disputes were not real, genuine or bona fide. For the reasons which follow I respectfully agree with the learned judge.*
- [12]. *Recognising that the truth almost always lies beyond mere linguistic determination the courts have said that an applicant who seeks final relief on motion must, in the event of conflict, accept the version set up by his opponent unless the latter’s allegations are, in the opinion of the court, not such as to raise a real, genuine or bona fide dispute of fact or are so far-fetched or clearly untenable that the court is justified in rejecting them merely on the papers . . .*
- [13]. *A real, genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed. There will of course be instances where a bare denial meets the requirement because there is no other way open to the disputing party and nothing more can therefore be expected of him. But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment. When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing*

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<sup>22</sup>. Note 1 para 26. See too Plascon-Evans (note 3) at 634I-635D.

<sup>23</sup>. *Wightman t/a JW Construction v Headfour (Pty) Ltd & another* 2008 (3) SA 371 (SCA) paragraphs 11-

*evidence) if they be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial the court will generally have difficulty in finding that the test is satisfied. I say “generally” because factual averments seldom stand apart from a broader matrix of circumstances all of which needs to be borne in mind when arriving at a decision. A litigant may not necessarily recognise or understand the nuances of a bare or general denial as against a real attempt to grapple with all relevant factual allegations made by the other party. But when he signs the answering affidavit, he commits himself to its contents, inadequate as they may be, and will only in exceptional circumstances be permitted to disavow them. There is thus a serious duty imposed upon a legal adviser who settles an answering affidavit to ascertain and engage with facts which his client disputes and to reflect such disputes fully and accurately in the answering affidavit. If that does not happen it should come as no surprise that the court takes a robust view of the matter.”*

44. In the case *Naidoo & another v Sunker & Others*<sup>24</sup> Heher JA held that what he had said in *Wightman* about the adequacy of allegations in answering affidavits for purposes of the Plascon-Evans rule ‘applies with equal force to a Respondent who endeavours to raise a special defence.’
45. In this case, the Respondent alleged that the Applicant resigned as a director. The Applicant disputed the allegation that he resigned as a director, this fact is supported by the communication exchanged by the parties. The Respondent specifically gave an undertaking on the 25<sup>th</sup> of October 2021 that “Your client will off course be informed of all actions taken as undertook”.<sup>25</sup> Mr. Venter further stated to the auditors that the Applicant will dispute his “removal as director”.<sup>26</sup> The applicant contends that it can therefore never be that Mr Venter truly believed that he resigned as a director as Mr. Venter himself was aware of the fact that he disputed this assertion.
46. The Constitutional Court’s judgment in *National Coalition for Gay and Lesbian Equality & others v the Minister of Home Affairs & Others* has made it clear that an appeal court will not interfere with a lower court’s discretion unless that court was influenced by

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<sup>24</sup>. *Naidoo & another v Sunker & others* [2011] ZASCA 216 para 23.

<sup>25</sup>. Section 001-44 to 45.

<sup>26</sup>. Section 003-0011.

wrong principles or a misdirection of the facts or if that court reached a decision the result of which could not reasonably have been made by the court properly directing itself to all the relevant facts and principles.<sup>27</sup> The Respondent does not allege that:

46.1. In exercising its discretion, this court was influenced by wrong principles or a misdirection of the facts; or

46.2. That the court reached a decision the result of which could not reasonably have been made by the court properly directing itself to all the relevant facts and principles.

On that basis, it is submitted that the above ground of appeal stands to fall.

#### THE THIRD AND FOURTH GROUNDS OF APPEAL

47. The Applicant submits that the third and fourth grounds of appeal relate to the fact that, according to the Respondent, this Court primarily adjudicated the matter within the confines of Chapter 6 of the Act. In considering whether the application falls within the ambit of section 163 of the Act, the Court specifically dealt with the oppressive conduct of the Respondent. The Court and in paragraphs 29 and 33 specifically dealt with the prejudicial conduct of Mr. Venter and it stated that *“The deadlock which eventuated between the Applicant and Mr. Venter directly placed the interest of innocent third parties who will stand to engage in dealings with the Respondent Company in jeopardy.”*

48. The Applicant submits therefore that it is unclear on what basis the Respondent seeks to allege that the Court misdirected itself in an instance where the Court specifically dealt with the provisions of section 163 and the ultimate relief sought by the applicant. It is therefore submitted that the above ground of appeal stands to fall.

#### THE FIFTH GROUND OF APPEAL.

49. The fifth ground of appeal relates to the allegations that the Respondent alleges that the Court did not take into consideration whether business rescue is indeed an appropriate remedy. The Applicant submits that the fifth ground of appeal is confusing and completely fails to consider the contents of the judgment. He points out that the Court specifically dealt with the discretion that the Court has in determining whether a company

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<sup>27</sup>. National Coalition for Gay and Lesbian Equality & others v Minister of Home Affairs & Others 2000 (2) SA 1 (CC) para 11.



should be placed in business rescue and similarly dealt with the prejudice that third parties, as well as the Applicant himself, would suffer should Mr. Venter be permitted to continue with his conduct. On that basis, the Applicant submits that the fifth ground of appeal also stands to fail.

#### SIXTH GROUNDS OF APPEAL.

50. The Respondent contends that the Court incorrectly applied the “financial distressed” test and that it premised that test upon outdated authority. It seeks to rely on the statement of account in support of its application for leave to appeal, in an instance where the Court already found that the Applicant provided the necessary information to contradict the Respondent’s statement of account.<sup>28</sup> The Respondent again fails to consider the fact that the court is exercising a discretion, which discretion will not be interfered with by a Court sitting on appeal unless it can be proven that the discretion:
  - 50.1. Was influenced by wrong principles or a misdirection of the facts; or
  - 50.2. That the court reached a decision the result of which could not reasonably have been made by the court properly directing itself to all the relevant facts and principles.
51. The Applicant points out that the Court to this effect considered the current financial position of the Respondent company as well as its ability to pay its debts as and when same fall due. The Court further considered the interest of third parties and the general body of creditors.<sup>29</sup>In paragraph 28 the Court further stated that *“While the Respondent disputes the allegations by the Applicant that it is not in a financial position to contend with the current level in a position to pay off the debts its indebtedness, it has not presented any proof that it is indeed in a position to pay off the debts unless there is some kind of intervention. The object behind this application entails an intervention which Applicant regards to be capable of pulling the Respondent Company out of its current indebtedness.”*
52. The Applicant argues that the above is proof that the Court considered the relevant principles applicable to “financially distressed”. On that basis, the Applicant submits that the sixth

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<sup>28</sup>. Paragraph 24 of the Judgment.

<sup>29</sup>. Paragraph 28 of the Judgment.

ground of appeal ought to fall.

#### SEVENTH GROUND OF APPEAL.

53. The Applicant raises issue with the fact that the Respondent alleges that the Court should have found that the he, (the Applicant), did not approach the Court with clean hands. Applicant charges that in this point, the Respondent is being opportunistic because Mr. Venter took no steps against the alleged conduct of the Applicant. He points out that Mr. Venter further failed to explain what should occur in the instance where there is a clear deadlock between the two directors of the Respondent Company.
54. Applicant further points out that it has already been found that the Respondent Company is indeed financially distressed and as such that it, (the Respondent), cannot dispute the fact that the Company either needs to be liquidated and/or placed under business rescue. On that basis, the Applicant submits that the seventh round of also ought to fall.
55. The Applicant argues that taking into consideration all of the above factors, this court has to conclude that the Respondent's application for leave to appeal and the grounds raised therein have no prospect of success, and accordingly the application for leave to appeal should be dismissed with costs on a punitive scale.
56. In this case there is no consensus about a number of issues. Major among others, the question whether the business concern in which the parties are involved deservedly falls to be subjected to business rescue is a subjected of much contention. The Applicant raises the issue that notice of the impending application for an order towards business rescue did not reach all of the parties that stood to be receive it.
57. On the other hand, the Applicant views that the manner in which the Respondent responded to the application, was such that created no need for such notice to be extended further than is reflected in it. Given the facts at hand, it cannot be absolutely contended that another court, will not reasonably view that some parties stand to be grossly prejudiced due to the fact that they were not furnished with the notice applicable to the application, especially where it regards the prayer towards the order

rendering the business concern which the parties were running to be subjected to supervision and business rescue.

58. However, due to concerns raised by the Applicant pertaining to the manner in which the business concern in issue was being run justifiably give rise to speculation on whether or not this business shall survive if it continues to be run without the involvement of the Applicant. It is also clear that a continued exclusion of the Applicant from all activities that have to do with the running of the business is bound to result in irreversible prejudice brought to bear against him.

59. In the result, the following order is granted:

ORDER.

59.1. The application for leave to appeal is granted.

59.2. In the interim, Mr. Gideon Slabbert shall remain meaningfully involved in the daily running of M K Africa Plant and Equipment Pty (Ltd) pending the finalisation of the appeal.

59.3. Costs shall be costs in the appeal.



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T. A. Maumela.  
Judge of the High Court of South Africa.

