IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NO:17897/2019

In the matter between:

STEPHEN MALCOLM GORE N. O **First Applicant**

SELBY MUSAWENKOSI NTSIBANDE **Second Applicant**

(In their capacities as duly appointed joint liquidators
Of Brandstock Exchange (Proprietary)Limited in Liquidation
Master's Reference No. C428/2018)

And

VAN WYK VAN HEERDEN ATTORNEYS INCORPORATED **Respondent**
(Registration No. 1995/003663/21)
Heard on 29 April 2021

Delivered electronically to the parties' legal representatives. The judgment shall be deemed to have been handed down at 15h00 on 10 May 2021

JUDGMENT ON LEAVE TO APPEAL

MAGONA, AJ

1. This is an application for leave to appeal to the Supreme Court of Appeal against the whole judgment and order of this court which was handed down on 11 February 2021.The relevant aspects of the order are as follows:

"*IT IS ORDERED that -*

1. *The (interlocutory) application to strike out is dismissed with costs; and*

2. *The main application succeeds and*

   2.1 It is declared that the following payments made by Brandstock Exchange (Proprietary) Limited, to the respondent on the stated dates:

      2.1.1 On 23 February 2018 in the amount of R75 000.

      2.1.2 On 23 February 2018 in the amount of R1 250 000.

      2.1.3 On 30 April 2018 in the amount of R200 000.

   Are dispositions without value as contemplated by section 26(1) of the Insolvency Act 25 of 1936 read with the section 340 of the Companies Act 61 of 1973 and they are set aside.

3. *The respondent is ordered to pay the afore stated amounts totalling to R1 525 000, 00 to the applicants.*

4. *Mora interest on the afore said amount at the legal rate calculated from 21 December 2018 until the date of payment.*

5. *The respondent is ordered to pay the costs of this application..."*

2. Disgruntled by the above order the Respondent now approaches this court for an application for leave to appeal to the Supreme Court of Appeal. I shall proceed to refer to the parties as they were in the main application.

3. As a brief background, the order emanates from an application brought by the Applicants(as the duly appointed liquidators) to have certain payments made by Brandstock Exchange (Pty) Ltd (in liquidation) into the Respondent's trust account as dispositions without value as contemplated in section 26(1) of the Insolvency Act 24 of 1936 read with section 340 of the Companies Act, 1973.The order was granted in favour of the Applicants whereby Respondent was ordered to repay the amounts totalling R1 525 000,00 plus interest. It is therefore against this decision that the application for leave to appeal lies.

4. In terms of Section 17 of the Superior Courts Act[1]leave to appeal may only be granted where the Judge is of the opinion that the appeal would have reasonable prospects of success or there is some other compelling reason why the appeal should be heard, including conflicting judgments.[2]

5. Respondent stated in its notice for leave to appeal

that the

> '*...application for leave to appeal is brought in terms of section 16(1)(a)(i) read with section 17(6) of the Superior Courts Act 10 of 2013 and on the following grounds:*

[1] Act 10 of 2013(the Act)
[2] See also MEC for Health, Eastern Cape v Mkhitha 2016 JDR 2214 (SCA) paras [16] to [17-

5. Should leave to appeal be granted, appeal would have reasonable prospects of success; and

6. One of the defences relied upon by the respondent, the scope of which is subject to conflicting judicial decisions, has not been directly pronounced upon by South African Courts; meaning that the appeal is one which properly falls within the ambit of section 17(1)(a)(ii) of the Superior Courts Act 10 of 2013.

7. Another compelling reason why an appeal should be heard, as envisaged in the aforesaid sub-section, is the importance of the relevant issue to the wider legal profession, in particular, the practice of attorneys and their employment of trust accounts in making payments such as occurred in the present instance."

6. The Respondent raised approximately 22 alleged errors made by the Court in support of its application for leave to appeal, these may be put into categories as stipulated in the paragraphs that follow.

Ground that the appeal would have reasonable Prospects of Success

7. First submission made was that the Court erred in refusing to grant an Application to strike out parts of the Applicant's affidavits. Second submission was that the court erred in making adverse findings against Mr Van Heerden (Van Heerden) who was not a party to the dispute. I have already stated in the judgment why the court accepted the hearsay evidence of Ms Pratt based on the hearsay rule, in

the interest of justice whereby the Court applied the principle laid out also in the *Lagoon Beach Hotel* case.[3]

8. I have further dealt with the reasons why that interlocutory application was dismissed based on the nature of the evidence of Ms Pratt. Ms Pratt's evidence was unrefuted by the Respondent and remained valuable in that under oath she disavowed the Utexx agreement and further that she did not know Van Heerden before the date of the enquiry, in the interests of justice amongst others, the evidence was accepted.[4] This is a discretionary approach which must be based in law[5], in my view the Court has given sufficient basis for its decision when dismissing the application to strike out based on law[6]

9. I am therefore of the view that these grounds hold no prospect of success.

10. Third submission was that the Court erred in not following or to have regard to the decision in *Iprolog*[7] as it made a finding that the respondent benefitted by the impugned payments for the purpose of section 26(1)(b) of the Act.

11. I have also dealt with these points raised in detail in my Judgment,[8] most notably the important question to answer in *casu* was whether there was a benefit to

[3] Lagoon Beach Hotel v Lehane (235/2015) [2015] ZASCA 210 (21 December 2015); Judgment para 54 and 61 to 70
[4] Judgment para 57 to 70
[5] McDonald's Corporation v Joburgers Drive-Inn Restaurant (Pty) Ltd; McDonald's Corporation v Dax Prop CC 1997 1 SA 1 (A) at 27D-E
[6] Judgment para 63 to 69
[7] M […]and Another v Murray and Others (251/2019) [2020] ZASCA 86(9 July 2020)

the Respondent. Because "payment'' of the impugned monies was made to the bank in favour of the Respondent where the latter had control over the funds, having the right of disposal the "benefit" element was fulfilled. The issue of the intention of the payment or such disposition did not arise.

12. Further to be clear it was based on the facts and the issue that was before the court in *casu* which included an enquiry whether the Respondent received the dispositions with a benefit in terms of section 26 of the Insolvency Act as was held in *De Villiers v Kaplan* and *Reynolds v Mercantile Bank and Others.* [9] Both these decisions, the full bench of this Division and the Supreme Court of Appeal (SCA) respectively held that no question of intent arises in the enquiry. I deal with these cases further below.

13. In that regard and though the court might not have referred to the *Iprolog case* such does not mean it was not considered. I understood the facts in that case were distinguishable in that the disposition by Mr M was found to have been made from a collusion with his wife Mrs M in terms of Section 31 of the Insolvency Act by making payments directly out of his own personal account which were found to be dispositions within the meaning of the Insolvency Act, that the first payment was made into an attorney's trust account for the credit of Iprolog[10]. (My emphasis)

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[8] Paragraphs 93 to 102 of the Judgment
[9] Reynolds and Others NNO v Mercantile Bank Ltd 2004(5) SA 220
[10] Iprolog para [30] to [31]

14. The enquiry *in casu* ended on who received the transferred "payments" or the dispositions from Brandstock's account (and not the intent of the payment), the answer remained, that it was the Respondent and that it was not a mere *conduit*.[11] They were dispositions without value in terms of section 26(1)(b) of the Insolvency Act.

15. Accordingly, as already stated in the Judgment the dispositions (in terms of section 26(1)(b) enquiry) were found to have been made to the Respondent hence the relevant case law was applied.[12]Further that the issue of who benefitted was held to have been to the Respondent which was also based on the relevant case law.[13]

16. I am therefore of the view that this ground holds no prospects of success.

17. Fourth submission made was that the court erred in finding that the impugned payments were made without value. As stated in the judgment the Respondent failed to prove that Brandstock was left solvent after the dispositions were made. The court went in detail and through the exercise of calculating the payments made, the assets and liabilities of Brandstock before and after the dispositions were made hence its findings.[14]

[11] Judgment para [93] to [100]
[12] Judgment para [71] to [78]; para [97] to [98]
[13] Para [97] to [98]
[14] Judgment para [103]to [110]

18. I was not convinced otherwise by the Respondent and in my view this ground does not hold any prospects of success.

19. Fifth submission made was that the court erred in finding that Van Heerden failed to act prudently during the whole process. In my view the hearsay evidence was accepted by the court as admissible based on the Law of Evidence Amendment Act.[15] The court considered the entirety of the evidence placed before it and made a finding. The findings made against Van Heerden are inferential based mostly on the evidence from the papers and the role he played during the whole transaction (balance of probabilities). I cannot deal with this point any further than that stated in the Judgment.[16]

20. In that regard I am of the view that this ground does not hold any prospects of success.

21. Sixth submissions made were that the court erred in refusing the striking out application whilst it then made adverse findings against Van Heerden who was not a party to the dispute. I have dealt with the reasons why the interlocutory application was dismissed based on the nature of the evidence of Pratt. The evidence was valuable in that under oath she disavowed the Utexx agreement and further that she did not

[15] Act 45 of 1988
[16] Judgment para and [57] to [69]

know Van Heerden before the date of the enquiry, hence in the interests of justice the evidence was accepted amongst others.[17]

22. In my view also this ground looking holistically to the facts in *casu* does not have prospects of success.

23. It is based on the above that in my view, the submissions made did not cross the threshold in support of the ground that there are reasonable prospects of success if leave were to be granted. The application in my view should not succeed on this ground.

24. I now move to consider the other grounds placed before this Court.

The Ground and submissions were made that leave to appeal be granted because there are conflicting decisions, and the appeal properly falls within the ambit of section 17(1)(a)(ii) of the Act.

25. In *casu* it is not in dispute that the dispositions were made to the trust account of the Respondent, the court then made a finding that the enquiry ended there. The issue of intention never had to arise hence the *De Villiers v Kaplan* and *Reynolds and Others* approaches were followed by this court as stated before. In my view and as indicated before I understood the case and principle applied in *Iprolog* case such could find no application to the facts of the case in casu. I deal with this more fully below.

[17] Judgment para [57] to [70]

26. I understood from the facts and case law mentioned above as being that there are two approaches to the kinds of dispositions that were before those cases.

26.1 The First approach is that *De Villiers v Kaplan* and *Reynolds and Others*[18] dealt with dispositions which stood to be set aside in terms of section 26 (as dispositions without value) like those in *casu* and in both cases the question of intent for such dispositions was held not to arise. (my emphasis)

26.2 The Second approach which I understood as that which was held in the *Iprolog* case, in that case the court dealt with a disposition which was found to be in terms of section 31 (as a collusive dealing before sequestration) and was susceptible to be set aside. The court looked at who was the money paid for (and I understood this to mean the intent of the payment) amongst others and it found it to have been to the credit of *Iprolog*[19] to prove the collusion element. The case therefore was distinguishable to that *in casu.* (my emphasis)

27. In that regard it is based on the above that I understood these two distinct approaches and I am not persuaded that there are conflicting judicial decisions on the points because the SCA is clear on the two approaches and this Court clearly followed the first approach hence it did not even mention the second approach and its case law.

[18] SCA decision mentioned supra-Reynolds p224 [D] to [J] p225 [A] to [G]
[19] SCA decision mentioned supra *Iprolog* case para [30]to [31], [34]to [37]

28. In that regard in my understanding of the case law it is my view that there are no conflicting judicial decisions that need the attention of the Supreme Court Appeal on the facts *in casu*.

The ground that there are compelling reasons why leave should be granted which includes the importance of the relevant issue to the wider legal profession, in particular the Attorneys and their employment of trust accounts.

29. In my view and from the onset, sight must not be lost of the issues that were before the court in *casu* and they related to the alleged dispositions of the impugned monies, and the court made its findings based on the *De Villiers v Kaplan* and the *Reynolds and Others* as precedents regarding trust accounts,[20] . Further comments made pertaining to the Attorney's profession and trust accounts remain mere *obiter dicta* and are not binding on the Attorney's Profession as was submitted.[21]

30. In my view this ground also cannot stand as a compelling reason for leave to be granted.

31. In the circumstances I am accordingly not persuaded that the Respondent has reached the threshold as set out in the new Act for leave to appeal to be granted.

32. In that regard I would make the following order:

[20] Judgment [93] to [99]
[21] Judgment [111] to [116]

(a) The application for leave to appeal is dismissed with costs.

P. MAGONA

Acting Judge of the High Court

APPEARANCES

For the applicant	:	Adv G Woodland SC
Instructed by	:	Mr M Oostenhuizen
		Oostenhuizen & Co
For the respondent	:	Adv R Goodman SC
		Adv A Brink
Instructed by	:	Mr W van Heerden