IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN

Case number: 17096/2020
Coram: **Montzinger AJ**
Heard: **31 January 2022**
Delivered: **04 February 2022**

In the matter between:

FIRSTRAND BANK LIMITED Applicant

and

DLX PROPERTIES (PTY) LTD Respondent
Registration No: 2[...]

JUDGEMENT ON LEAVE FOR APPEAL
(DELIVERED BY E-MAIL ON FRIDAY 04 FEBRUARY 2022)

MONTZINGER AJ

[1] The applicant ("FNB") seeks leave to appeal against the main judgement handed down on 9 December 2021. I dismissed FNB's application seeking the provisional winding-up of the respondent.

[2] The threshold that I must apply to consider whether leave to appeal should be granted is encapsulated in ss 17(1)(a)(i) and (ii) of the Superior Court Act, 10 of 2013. In support of its application for leave to appeal FNB contends that it satisfies either of the thresholds envisaged in the subsection and leave to appeal should therefore be granted.

[3] I am therefore required to determine whether an appeal would have a reasonable prospect of success or whether there is some other compelling reason why the appeal should be heard. The Supreme Court of Appeal in *Ramakatsa and Others v African National Congress and Another* [2021] ZASCA 31 (31 March 2021)[1] recently restated the test an applicant seeking leave to appeal must pass. I am bound by the formulation of the test in *Ramakatsa.*

[4] In the main judgement I found that the respondent did not convince me that it raised a bona fide dispute to FNB's claim. I also found that the respondent was commercially insolvent. However, in dismissing the application, I relied on my judicial discretion (categorised as a wide discretion) to find that the facts and circumstances of this matter justified a dismissal of the application.

Clerical error in the main judgement

[5] Paragraph 24(a) of the main judgement must be corrected or changed as it contains a clerical error. It is apparent that I intended to express the concern whether the winding-up of the respondent was only for the benefit of FNB and not for all the creditors of the respondent. The last part of the paragraph was meant to read:

> "…debtor, the silence on FNB's approach to DLX Properties raise a concern with the Court that the purpose of the winding-up application is not for the benefit of DLX Properties' **creditors** but rather solely for FNB…"

[6] The word **'creditors'** was omitted from paragraph 24(a) due to an oversight. It does not alter the substance of my judgement and the paragraph should be read with the word 'creditors' as intended.

The grounds in support of the application

[7] During oral argument FNB focussed primarily on two grounds to convince me why leave should be granted. The first ground proposed that FNB had a reasonable prospect of success on appeal as I was influenced by a wrong principle in law when I

[1] Par 10

elected to apply a so called 'wide discretion' while the law envisaged the application of a 'narrow discretion'. Secondly or in the alternative it was argued that the manner in which I decided to exercise my discretion constitutes a compelling reason why the appeal should be heard.

The exercise of the Court's discretion

[8] To convince me that a court of appeal may differ with my application of a court's judicial discretion Mr Muller SC, who appeared with Mr Jonker on behalf of FNB, placed reliance on the *Afgri Operations*[2] judgement. The mentioned judgement by the Supreme Court of Appeal endorses the position in law that: (1) an unpaid creditor ordinarily has a right, *ex debito justitiae*, to a winding-up order against the respondent company that has not discharged that debt; and (2) the discretion of the court to refuse to grant a winding-up order where an unpaid creditor applies for a debtor company's winding-up is a *very narrow one that is rarely exercised*.

[9] In the main judgement I found that FNB has not been paid, that the respondent is commercially insolvent and that no bona fide defence has been raised against FNB's claim. Based on those findings Mr Muller argued that my approach of applying a wide discretion to dismiss the application is the antithesis of the position in *Afgri Operations*.

[10] *Afgri Operations* is one of a long line of cases who all concluded that the discretion of the Court, where an unpaid creditor seeks a winding-up order against a company that is unable to pay its debts, is a very narrow one[3]. There is no doubt that I did not follow a narrow approach in the exercise of my discretion. My approach was rather infused by Rodgers J's reasoning in the *Orestisolve*[4] judgement and the policies underlying the 2008 Companies Act. Rodgers J expressed his doubts that the *ex debito justitiae* maxim has never been, or justified, an inflexible limitation on the court's discretion[5]. He reasoned that it would be a mistake to attempt to lay down binding rules for the exercise of a judicial discretion. He concludes by finding that the *ex debito*

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[2] *Afgri Operations Limited v Hamba Fleet (Pty) Limited* [2017] JOL 37585 (SCA) ("*Afgri Operations*")
[3] See cases cited at footnote 16 of *Afgri Operations* judgement
[4] *Orestisolve* (*Pty*) *Ltd t/a Essa Investments v NDFT Investment Holdings* (*Pty*) *Ltd and another* 2015 (4) SA 449 (WCC)
[5] Par 18 of *Orestisolve* judgement

justitiae maxim conveys no more than: that a court cannot on a whim decline to grant the order, where a creditor has satisfied the requirements of a liquidation order.

[11] The reasoning of Rodgers J in *Orestisolve* was in fact endorsed by the SCA in the *Afgri Operations* judgment[6]. The same judgement on which strong reliance was placed by FNB to drive the point home that the court has a narrow discretion. So while the SCA at paragraph 12 of *Afgri Operations* endorsed the traditional view that a court's discretion is limited where an unpaid creditor applies for a winding-up order, it in the same breath endorsed *Orestisolve* which found that the court's discretion cannot be limited by rules.

[12] In my attempt to ascertain what the extent of the 'narrow discretion' is I could not come across a judgement that could define the limitation of the discretion. The manner in which the 'narrow discretion' has been formulated, and indeed argued by Mr Muller, appears to me to create the potential scenario that a Court is ultimately in the position where it is required go '*sit under a palm tree'* once a creditor has satisfied the requirements for a liquidation order. The narrow discretion then appears to be no discretion at all.

[13] A further basis on which I elected to follow a broader approach to exercise my discretion is expressed in paragraph 21 of the main judgement where I reasoned that the Court's discretion is also guided in consideration of legislative policies underlying the 2008 Companies Act in favour of saving ailing companies. This finding was also criticised during the leave to appeal argument.

[14] Relying on the judgement of *Boschpoort*[7] Mr Muller impressed on me that the SCA has found that the 2008 Companies Act did not change the trite principles that must be applied when a court considers whether a commercially insolvent company should be placed in liquidation. Mr Muller placed reliance on a phrase in the *Boschpoort* judgment where the SCA said that it was 'business as usual'. The

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[6] Footnotes 14 and 15

[7] *Boschpoort Ondernemings (Pty) Ltd v Absa Bank Ltd* 2014 (2) SA 518 (SCA) at para 25 ("*Boschpoort*")

proposition continued that the SCA[8] connotes 'business as usual' to mean that a creditor has a right *ex debito justitiae* to a winding-up order against a respondent company that has not discharged that debt.

[15] On consideration of the *Boschpoort* judgement it is apparent that the SCA did not wrestle with the extent of its discretion in the shadow of the new 2008 Companies Act. The SCA in *Boschpoort* was rather concerned with the question whether a company that is commercially insolvent but factually solvent should be liquidated under the 1973 Companies Act or the new 2008 Companies Act.

[16] The use of the phrase 'business as usual' in *Boschpoort* was in the context of contending that our law recognised that a commercially insolvent company, despite its factual solvency status, will continue to be liquidated in terms of the 1973 Companies Act. The SCA used the phrase itself[9] in that context.

[17] I am therefore of the view that *Boschpoort* is distinguishable as it does not address the issue of a court's discretion and to which extent a court must consider the legislative policies underlying the 2008 Companies Act in favour of saving ailing companies. *Afgri Operations* also does not connote a meaning to 'business as usual' as was relied on by FNB.

[18] I also do not agree with the proposition, that was also advanced, that a court's discretion to engage with the policies underlying the 2008 Companies Act are only activated when there is a competing business rescue application. There are rather judgments[10] that endorse the view that a court's discretion has changed from the traditional (i.e. a narrow discretion') since the dawn of the 2008 Companies. Rodgers J refers to these in *Orestisolve* when dealing with the extent of a court's discretion.

[19] There is a further reason why I am not convinced by the proposition that the policies to save ailing companies that underlies the 2008 Companies Act does not

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[8] *Afgri Operations*
[9] At para 25
[10] *Absa Bank Ltd v New City Group (Pty) Ltd and Other Cases* [2013] 3 All SA 146 (GSJ) paras 29 - 33; *Dippenaar NO and Others v Business Venture Investments NO 134 (Pty) Ltd* [2014] 2 All SA 162 (WCC) paras 45 - 46

connote to the court a wider discretion. The SCA in *Boschpoort* actually alerted me to the lacuna in the proposition. Section 131(6) of the 2008 Companies Act has the effect that it suspends an application seeking the liquidation of a company, until the business rescue application has been adjudicated or came to an end. This means that a liquidation application will always be adjudicated in the absence of a competing business rescue application. The two can clearly not exist together. It can therefore not be that a court that considers a liquidation application, similar to the situation in this matter, can only consider the policies underlying the 2008 Companies Act when it exercises its discretion in circumstances when there is a competing business rescue application. Such a scenario will never presents itself.

Conclusion

[20] Despite my reservations about the arguments in support of the leave to appeal application, if I apply a dispassionate analysis to FNB's application for leave it is apparent that a court of appeal could on the issue of how I exercise the court's discretion arrive at a different conclusion. That possibility constitutes a reasonable prospect of success.

[21] In addition, there certainly exist other compelling reasons why the appeal should be heard. These are at a minimum:

(a) whether a narrow or wide discretion applies in matters with a factual matrix similar to this matter;

(b) the extent of a court's discretion whether the discretion is regarded as wide or narrow; and

(c) regardless of whether the discretion is wide or narrow, to which extent should the policies underlying the provisions of the 2008 Companies Act influence a court's discretion that is required to decide an application with the characteristics that served before me.

[22] Considering the conclusion I have reached it is not necessary to consider FNB's criticism that I committed material errors of facts.

[23] Having regard to the divergent views on the issue of a court's discretion it is prudent that the Supreme Court of Appeal should be engaged.

[24] I accordingly make the following order:

24.1 The applicant is granted leave to appeal to the Supreme Court of Appeal.

24.2 The costs of the application for leave to appeal, including the hearing, shall be the costs in the appeal, including the costs of two counsel.

MONTZINGER, AJ
Acting Judge of the High Court

Appearances:

Applicant's counsel:	Adv J Muller SC, Adv W Jonker
Applicant's attorney:	Kemp & Associates
Second respondent's counsel:	Adv L Van Zyl
Second respondent's attorney:	K J Bredenkamp Attorneys