IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO:2022/17204

DELETE WHICHEVER IS NOT APPLICABLE	
(1)	REPORTABLE: Yes
(2)	OF INTEREST TO OTHER JUDGES: Yes
(3)	NOT REVISED
07/11/2022	

In the matter between:

JUSTICE EPHRAIM KUDUMELA **Applicant**

and

MATHILDA CARMODY **First Respondent**

MATSWAY STEEL (PTY) LTD (in liquidation) **Second Respondent**

In re:

MATHILDA CARMODY **Applicant**

and

JUSTICE EPHRAIM KUDUMELA. N.O. **First Respondent**

MATSWAY STEEL (PTY) LTD (in business rescue) **Second Respondent**

Leave to appeal: Manner of drafting application – to be succinct and to the point – accurate analysis of judgment necessary.

Costs *de bonis propriis*: When business rescue practitioner to pay costs in personal capacity – not only in cases of gross negligence.

JUDGMENT: LEAVE TO APPEAL

YACOOB J:

1. The applicant ("Mr Kudumela") is the erstwhile business rescue practitioner of the second respondent ("Matsway"). He seeks leave to appeal this court's order that he, in his personal capacity, pay costs of the application to remove him as business rescue practitioner brought by the first respondent ("Ms Carmody").
2. The application to remove Mr Kudumela was heard and determined together with an application to convert Matsway's business rescue to liquidation, which was brought by Mr Kudumela. I found that Mr Kudumela failed to comply with his statutory obligations, and was unable to provide satisfactory explanations for his non-compliance. I found also that, since the liquidation application demonstrated that the business rescue would not be successful, the appropriate outcome would be a conversion to liquidation, rather than the removal of Mr Kudumela and his replacement by another business rescue practitioner.
3. Since no substantive order was made against him, in the removal application, there is nothing for Mr Kudumela to appeal save for the costs order.
4. Mr Kudumela filed a 45 page long notice of application for leave, complete with argument and authorities. It also contains some content that cannot be said to make any sense by any reasonable reader, for example paragraph 1.2, that:

   > "there are exceptional circumstances under which the question whether the decision would have no practical effect or result is to be determined without reference to any consideration of costs"

and paragraph 1.6, which suggests, wrongly, that the judgment does not dispose of all the issues in the case, but “the appeal would lead to a just and prompt resolution of the real issues between the parties”. It is unclear how exactly an appeal on costs would resolve real issues between the parties that a judgment has allegedly left undisposed of.

5. The summary of the findings of the court is inaccurate, and it is unclear whether this results from wilful misunderstanding, or sheer sloppiness.
6. This is not what an application for leave to appeal should be, and I consider that the manner in which the application was drafted is bordering on vexatious. An application for leave should be succinct, cogent, and void of all extraneous matter. It should demonstrate that a careful analysis of the judgment sought to be appealed has taken place. It should, like all pleadings, notices and other documents filed in legal proceedings, make logical, grammatical and contextual sense. Argument should be left for the hearing or the heads of argument, if any.
7. A number of the grounds raised on appeal rely on an apparent misunderstanding of the findings in the main judgment. I do not propose to rewrite or to gloss the main judgment. Ms Carmody’s counsel appears to have been able to understand the main judgment, so I do not consider that any further explanation is necessary, or that there is any obvious error in the reasoning or the factual findings.
8. I do not deal with every single ground of appeal raised. In my view there is no merit in any of the grounds. I have read and considered them. In this judgment I deal only with those which I consider to be the strongest.
9. The application for leave suggests that the application to remove was dismissed because Ms Carmody did not make out a case to extend the business rescue. This is not the case. As is clearly stated in the main judgment, the application to remove

was dismissed because the liquidation application demonstrated that the company should be liquidated. Had the removal application been heard and determined in isolation of the liquidation application, it is more than likely that it would have been successful.

10. It was submitted for Mr Kudumela that the court did not have the right to take into account the liquidation application in determining the removal application. There is no merit in this submission. There is more than sufficient authority for the proposition that the two applications are so intertwined that the outcome of one can be affected by the other.

11. In any event, the court did not rely on the liquidation application to find that the removal application should succeed, but rather that the court's discretion should be exercised in favour of liquidation rather than the continuation of business rescue. This does not mean that Ms Carmody failed to place facts before the court on the basis of which the relief she sought could be granted. Rather, it means that there was other information that swayed the discretion of the court. There is a difference, and the argument to the contrary has no merit.

12. The application also places an undue amount of emphasis on this court's use of the words "the primary reason" in explaining why Ms Carmody should recover costs from Mr Kudumela. It was submitted that this means the fundamental reason, and that it was not a case of a combination of reasons of which the primary reason is the most determinative. It is clear from the judgment that there are a number of reasons why Mr Kudumela should bear the costs in his personal capacity. These included the fact that the answering affidavit was unhelpful and voluminous, and when analysed, did not demonstrate substantive opposition. Mr Fourie attempted

to demonstrate that the affidavit did in fact provide substantive opposition, but even having considered again, I am still of the view that it did not.

13. In addition, it is clear from the judgment as a whole that Mr Kudumela's conduct during the business rescue also played a part in the finding that he should pay costs in his personal capacity. He did not fulfil any of his obligations, not even that of bringing an application to convert business rescue to liquidation as soon as it became clear the business could not be rescued. His conduct clearly falls short of the standard required of a business rescue practitioner, who is both an officer of the court, and on whom the Companies Act, 71 of 2008 ("the Act") imposes the same standard as that imposed on directors.

14. Mr Fourie submitted that the court found that Mr Kudumela's actions were not grossly negligent, because the court did not order him to pay back his fees, and that therefore section 140(3)(c) of the Act precludes a costs order being made against him.

15. There are two difficulties with this argument. First, the court made no finding that Mr Kudumela was not grossly negligent. The failure to order the refund of fees is neither here nor there, because it was not sought. Mr Kudumela's conduct amounts to a dereliction of duty, and it is clear that that is what the court found. That may be worse than gross negligence in certain circumstances. However there is no need for me to make that finding.

16. Second, section 140(3)(c) does not preclude a costs order where there is no finding of gross negligence. For convenience, I reproduce section 140(3) below.

> (3) During a company's business rescue proceedings, the practitioner—
>
> (a) is an officer of the court, and must report to the court in accordance with any applicable rules of, or orders made by, the court;

(b) has the responsibilities, duties and liabilities of a director of the company, as set out in sections 75 to 77; and

(c) other than as contemplated in paragraph (b)—

(i) is not liable for any act or omission in good faith in the course of the exercise of the powers and performance of the functions of practitioner; but

(ii) may be held liable in accordance with any relevant law for the consequences of any act or omission amounting to gross negligence in the exercise of the powers and performance of the functions of practitioner.

17. From this it is clear that gross negligence in the exercise of powers and performance of functions is not the only time a business rescue practitioner can be held liable in any way.

18. A business rescue practitioner may be held liable for an act or omission not in good faith, since he or she is only protected by section 140(3)(c)(i) for acts or omissions in good faith.

19. In addition, a business rescue practitioner maybe held liable “as contemplated in paragraph (b)” of section 140(3), that is, when a director of the company may be held liable, in accordance with sections 75 to 77 of the Act.

20. Section 76(3) requires a director, and therefore a business rescue practitioner, to exercise powers and perform functions

(a) in good faith and for a proper purpose;

(b) in the best interests of the company; and

(c) with the degree of care, skill and diligence that may reasonably be expected of a person—

(i) carrying out the same functions in relation to the company as those carried out by that director; and

(ii) having the general knowledge, skill and experience of that director.

21. Section 77 provides for liability of a director and business rescue practitioner. It includes the following:

> (2) A director of a company may be held liable—
>
> (a) in accordance with the principles of the common law relating to breach of a fiduciary duty, for any loss, damages or costs sustained by the company as a consequence of any breach by the director of a duty contemplated in section 75, 76 (2) or 76 (3) (a) or (b); or
>
> (b) in accordance with the principles of the common law relating to delict for any loss, damages or costs sustained by the company as a consequence of any breach by the director of—
>
> (i) a duty contemplated in section 76 (3) (c);
>
> (ii) any provision of this Act not otherwise mentioned in this section; or
>
> (iii) any provision of the company's Memorandum of Incorporation.

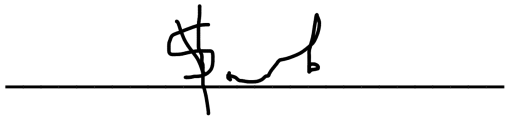
22. It is clear to me that Mr Kudumela's conduct falls foul of 76(3)(b) and (c). It is equally clear that section 77(2) permits him to be held liable for the costs of these proceedings as he has been found to have breached his fiduciary duties.

23. Although I did not consider these sections in making my order, I am not convinced that an appeal court when considering these issues will find it appropriate to interfere with the costs order against Mr Kudumela.

24. For these reasons, therefore, I order:

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

(b) Mr Kudumela is to pay the costs of the application for leave.



S. YACOOB

JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION, JOHANNESBURG

Appearances

Counsel for the Applicant:	C Van Der Linde
Instructed by:	Gittins Attorneys
Counsel for the 1st Respondent:	J Fourie
Instructed by:	Saltzman Attorneys
Date of hearing:	28 October 2022
Date of judgment:	07 November 2022