

SOUTH AFRICA / JUDGMENT

African Paper Products (Pty) Ltd and Another v Director of Public Prosecutions: Eastern Cape and Another (Leave to Appeal) (250/2020) [2023] ZAECKMHC 29 (9 March 2023)

[2023] ZAECKMHC 29

COURT

Eastern Cape High Court, Makhanda

BEFORE

Lowe, Bands

CASE / FILE NUMBER

250/2020

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IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION, MAKHANDA)

Case No: 250/2020

In the matter between:

AFRICAN PAPER PRODUCTS (PTY) LTD

First Applicant

VISHAL DEVRAJ SEEBRAN

Second Applicant

and

THE DIRECTOR OF PUBLIC PROSECUTIONS:

First Respondent

EASTERN CAPE

THE REGIONAL MAGISTRATE COMMERCIAL

Second Respondent

CRIMES COURT, PORT ELIZABETH

MR CLAASEN

JUDGMENT ON APPLICATION FOR LEAVE TO APPEAL

BANDS AJ:

- [1] The applicants seek leave to appeal against the whole of this court's judgment and order granted in favour of the respondents, delivered on 31 October 2022.
- [2] The test to be applied in applications of this nature finds legislative expression in section 17 of the Superior Courts Act, 10 of 2013 ("the Act"), which provides that leave to appeal may only be granted where the judge concerned is of the opinion that the appeal would have a reasonable prospect of success, or that there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration.
- [3] The applicants bring their application in terms of section 17(1)(a)(i) of the Act only.
- [4] The Supreme Court of Appeal has on more than one occasion had the opportunity to consider what constitutes a reasonable prospect of success, which is stated to be as follows:

[1]

"What the test of reasonable prospects of success postulates is a dispassionate decision, based on the facts and the law, that a 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 categorised as hopeless. There must, in other words, be a sound, rational basis for the conclusion that there are prospects of success on appeal."

- [5] It is against this backdrop that this application is adjudicated.
- [6] The applicants rely on six grounds of appeal, each of which are dealt with below.

First and third grounds of appeal

- [7] The applicants' first and third grounds of appeal take issue with the legal principles applied by the court to the facts of the matter. More particularly, the applicants contend that: (i)

"the court's finding was influenced by the wrong application of jurisprudential principles arising in different areas of the law to the criminal proceedings before it"; and (ii) "the court took an impermissible view of what constituted a gross irregularity and impermissibly applied arbitration and labour review jurisprudence to the exercise of the discretion required of it in terms of section 22 of the Act".

- [8] The applicants lose sight of the fact that the principles relied upon by this court in paragraphs [31] to [35] of the judgment, with reference to *Telecordia Technologies Inc v Telkom SA Ltd*[2] and *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*, [3] constitute a restatement of the law distilled in *Ellis v Morgan*; *Ellis v Desai*[4] and *Goldfields Investments Ltd and Another v City Council of Johannesburg and Another*, [5] in that if a complaint is against the result of the proceedings, the appropriate remedy is by way of

appeal; whereas, if the method of the proceedings is attacked, the remedy is to bring the matter in review.[6] This is settled law.

- [9] Paragraphs [19] to [29] of the court's judgment deal extensively with the further legal principles, insofar as they are applicable to the facts of the present matter, and more particularly, which govern the court's power to interfere with unterminated proceedings in a lower court, inclusive of criminal law proceedings,

and need not be repeated herein.

- [10] On a proper application of the law to the facts of the present matter, and for the reasons set out in this court's judgment, I do not think that there are reasonable prospects that another court will come to a different

conclusion.

Second and sixth grounds of appeal

- [11] The applicants' second and sixth grounds of appeal pertain to this court's finding that the grounds of review relied upon by the applicants are directed at the result of the proceedings in the Commercial Crimes Court and not with the method thereof. The applicants' grounds for review, which are set out in paragraph 31 of the applicants' founding papers and are repeated in paragraph [16] of this court's judgment, were previously dealt

with by me, contextually, and speak for themselves.

- [12] In any event, at paragraphs [39] to [41] of the judgment, I set out as follows:

"[39] Even if I am incorrect in this conclusion, whether or not the applicants are satisfied with the result of the objection proceedings, there can be no doubt that the second respondent considered the applicants' grounds of objection and applied his mind thereto in deliberating the issues before him. This much is clear from a reading of the ruling in question. There is nothing from the second respondent's reasons from which it is apparent that his mind was not in a state to enable him to try the matter fairly or that his conduct prevented a fair trial of the

issues.

- [40] I am not persuaded that the applicants have shown the presence of any of the grounds referred to in section 22 of the Superior Courts Act; nor have they demonstrated that there are circumstances to satisfy this court that absent an intervention at this stage, grave injustice

may result, such as to materially prejudice the applicants, which could not, in due course be corrected on review or appeal. I deal with this in greater detail below.

- [41] Accordingly, the applicants' application for review in medias res, must, on either of these additional grounds, meet the same fate."

[13] Detailed reasons for my above findings are contained in paragraphs

[41] to [63] of this court's judgment. If regard is had to such reasons, I am of the view that there are no reasonable prospects that another court will come to a different conclusion.

Fourth and fifth grounds of appeal

[14] The applicants' fourth and fifth grounds of appeal, broadly stated, pertain to the court's finding that the second applicant had sufficient details of the forgery charges against him in circumstances "where the State had failed to identify him as the person who forged the document."

[15] The issue of actus reus, as well as the legal principles pertaining to the requirements of a charge sheet; the purposes therefor; and what is required of the state at the relevant stage of the proceedings, was dealt with by me in paragraphs [52] to [59] of the court's judgment. I further dealt with the clear wording of the charge sheet in question, read together with the preamble thereto; the state's answer to the request for particulars; and the applicants' contention that the charges do not disclose an offence. In short, the conclusion arrived at by me in paragraph [59] is as follows:

"...it is clear from the unambiguous terms contained in the charge-sheet that the State has nailed its colours to the mast and relies solely on the personal liability of the second applicant. It cannot be gainsaid that the second applicant has sufficient detail to (i) inform him of the nature of the charges against him; (ii) enable him to answer thereto; and (iii) properly mount his defence. There can be no question that the second applicant is not at risk of a trial by ambush or prejudiced in his preparations for trial. Whether the State will, in due course, be in a position to prove its case on the evidence available to it, which evidence is not within the particular knowledge of this court, is not for this court to determine. I am not at liberty, at this stage of the proceedings, to draw an inference concerning the strength or weakness of the State's case from the prosecutor's inability to furnish particulars."

[16] I am accordingly of the view that there are no reasonable prospects that another court will come to a different conclusion in respect of the applicants' fourth and fifth ground of appeal.

Conclusion

[17] In the result, I am of the view that there exists no reasonable prospect of success in the contemplated appeal. Given the nature of these proceedings, I am of the view that each party should be ordered to pay their own costs. Accordingly, the following order shall issue:

1. The applicants' application for leave to appeal is dismissed.
2. Each party is to pay their own costs.

I BANDS

ACTING JUDGE OF THE HIGH COURT

I agree:

M LOWE

JUDGE OF THE HIGH COURT

Appearances:

For the Applicants: J.P Broster Instructed by: Pather & Pather Attorneys c/o Nolte Smit Attorneys
51A High Street, Makhanda For the First Respondent: N.L. Ntsepe Instructed by: The State
Attorney c/o Yokwana Attorneys 10 New Street, Makhanda Coram: Lowe J et Bands AJ Date heard:
8 March 2023 Delivered: 9 March 2023

[1] S v Smith 2012

(1) SACR 567 (SCA) para 7. Maphana and Another v S (174/2017)

[2018] ZASCA 8 (1 March 2018). Ramakatsa and Others v African National Congress and Another
(724/2019)

[2021] ZASCA 31 (31 March 2021) at para 10.

[1] S v Smith 2012

(1) SACR 567 (SCA) para 7.

Maphana and Another v S (174/2017)

[2018] ZASCA 8 (1 March 2018).

Ramakatsa and Others v African National Congress and Another (724/2019)

[2021] ZASCA 31 (31 March 2021) at para 10.

[2] 2007

(3) SA 266 (SCA)

[3] 2008

(2) SA 24 at para [265].

[4] 1909 TS 576.

[5] 1938 TPD 551.

[6] See also: *Snyders v De Jaager* 2016 (5) SA 218 (SCA) at 222F-J. See also: DE van Loggerenberg,
Erasmus, *Superior Court Practice Vol 2* (Juta), Second Edition, [service 4, 2017] at A2-123;
and [service 7,2018] at A2-133.

[6] See also: *Snyders v De Jaager* 2016 (5) SA 218 (SCA) at 222F-J.

See also: DE van Loggerenberg, Erasmus, *Superior Court Practice Vol 2* (Juta), Second Edition,
[service 4, 2017] at A2-123; and [service 7,2018] at A2-133.

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