

SOUTH AFRICA / JUDGMENT

Dlamini and Others v Imbokodv Lemabalabala Holdings Limited and Others (2022/051081) [2024] ZAGPJHC 1112 (31 October 2024)

[2024] ZAGPJHC 1112

COURT

South Gauteng High Court, Johannesburg

BEFORE

L R Adams

CASE / FILE NUMBER

2022/051081

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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

case NO: 2022-051081

DATE: 31 October 2024

In the matter between:

DLAMINI, PRINCE MAKHOSONKE CAMBRIDGE First Applicant

EMBHULENI TRADITIONAL AUTHORITY

Second Applicant

NKOSI, ACTING CHIEF NDUMISO

Third Applicant

EDLAMBHEDLWINI TRIBAL AUTHORITY

Fourth Applicant

and

IMBOKODVO LEMABALABALA HOLDINGS LIMITED First Respondent

IMBOKODVO LEMABALABALA FORESTRY (PTY) LTD Second Respondent

THE UNLAWFUL BOARD OF

IMBOKODVO LEMABALABALA FORESTRY (PTY) LTD Third Respondent

THE TRADITIONAL AUTHORITY INVESTMENT

HOLDINGS COMPANY ('TAIHC')

Fourth Respondent

KOTI INVESTMENTS (PTY) LTD

Fifth Respondent

COMMISSION FOR INTELLECTUAL PROPERTY

AND COMPANIES Sixth Respondent

SIYAQHUBEKA FOREST (PTY) LIMITED

Seventh Respondent

SOUTH AFRICAN FOREST COMPANY LIMITED Eighth Respondent

Neutral Citation: Prince Dlamini & Other v Imbokodvo Lemabalaba Holdings and Others
(051081/2022) [2024] ZAGPJHC --- (31 October 2024)

Coram: Adams J

Heard: 31 October 2024

Delivered: 31 October 2024 – This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to CaseLines and by release to SAFLII. The date and time for hand-down is deemed to be 12:30 on 31 October 2024.

Summary: Application for leave to appeal – s 17(1)(a)(i) of the Superior Courts Act 10 of 2013 – an applicant now faces a higher and a more stringent threshold – leave to appeal granted –

Uniform Rule of Court 42(1)(b) – issues not dealt with in main judge, which should have been dealt with – patent error – corrected in application for leave to appeal judgement – order granted to give effect to true intention of court a quo.

ORDER

(1) In terms of Uniform Rule of Court 42(1)(b), the order of the court dated 16 July 2024 is corrected and varied by the addition of the following two orders after prayer (2): -

'(3) The first, second, third and fifth respondents shall pay the applicants' costs relating to the first, second, third and fifth respondents' interlocutory application (dated 31 March

2023) to strike out certain portions of the applicants' replying affidavit, which application was formally withdrawn by the respondents at the hearing of the main application on 31 January 2024;

- (4) In the related application under case number 2020-28813, each party shall bear its own costs incurred after 25 August 2020.'
- (2) The applicants' application for leave to appeal succeeds.
- (3) The applicants are granted leave to appeal to the Full Court of this Division.
- (4) The costs of this application for leave to appeal shall be costs in the appeal.

JUDGMENT [APPLICATION FOR LEAVE TO APPEAL]

Adams J:

[1]. I shall refer to the parties as referred to in the original application by the first to fourth applicants ('applicants') for declaratory orders which, if granted, would have had the effect of 'reinstating' the first applicant as a director of the second respondent ('ILF'), as well as acknowledging the applicants' interest in that company. The applicants are the applicants in this application for leave to appeal and the first, second, third and fifth respondents ('respondents') are the respondents in this application. On 16 July 2024 I dismissed with costs the applicants' application.

[2]. The applicants apply for leave to appeal the whole of my judgment dated 16 July 2024, as well as my reasons therefor, in terms of which I had dismissed their application with costs.

[3]. The application for leave to appeal is mainly against my factual findings, based on the findings by the arbitrator in an arbitral award, that factually the first respondent (ILH) is and was, at all times material hereto, the 100% shareholder of ILF. The first applicant (Mr Dlamini), so I found, was never a shareholder in ILF, and he could accordingly not be removed as such from the said company. Furthermore, as regards the decision to have him removed as a director of ILF, that was a decision of the shareholder of ILF, that being ILH, who acted fully within their rights to have a director of their subsidiary removed.

[4]. In their notice of application for leave to appeal, the applicants allege numerous grounds for the said application. Importantly, they contend that the court a quo erred in finding that once a resolution had been taken by the shareholders of a company to remove a director it is not reviewable. This finding, so the applicants contend, is bad in law and is not supported by any case law. I also erred, so the applicants contend, in my finding that ILH has been acting as its direct shareholders through TAICHG, being nine communities that are spread over the territorial area of Limpopo and Mpumalanga. It is also contended by the applicants that I erred in failing to declare the 'draft shareholders agreement' null and void and in conflict with the Shareholder agreement signed in 1999. I should have found, so the contention goes, that the Shareholder's agreement signed in 1999 is the true and authentic agreement governing the relationship of the of the shareholders in the ILH Group.

[5]. There are a number of further grounds on the basis of which, according to the applicants, leave to appeal should be granted. In sum, the applicants contend that most, if not all, of my factual findings were misdirections. So, for example, the applicants aver that I should have declared that the ILH board was not properly constituted on 17 September 2022 and I should therefore have nullified the resolution taken on that day.

[6]. Moreover, the applicants contend that the court a quo, in its assessment of the facts, incorrectly applied the Plascon Evans principle, by accepting the evidence contained in the answering affidavit filed by the respondents notwithstanding its glaring

weakness, and rejecting the case made out by the applicants which was supported by the facts and the law.

[7]. Nothing new has been raised by the applicants in this application for leave to appeal. In my original written judgment, I have dealt with most, if not all of the issues raised by the applicants in this application for leave to appeal and it is not necessary for me to repeat those in full. Suffice to restate what I say in the judgment, namely that, on the basis of the findings in the arbitral award, the relief sought by the applicants in the main application should fail. The arbitrator found that the shareholders' agreements regulated the relationship between the interested parties. ILH has a shareholders'

agreement which is extant and valid, and it is ironic that Mr Dlamini is in fact the person who signed the said agreement on behalf of ILH.

[8]. The traditional test in deciding whether leave to appeal should be granted was whether there is a reasonable prospect that another court may come to a different conclusion to that reached by me in my judgment. This approach has now been codified in s 17(1)(a)(i) of the Superior Courts Act 10 of 2013, which came into operation on the 23rd of August 2013, and which provides that leave to appeal may only be given where the judge concerned is of the opinion that 'the appeal would have a reasonable prospect of success'.

[9]. In *Ramakatsa and Others v African National Congress and Another*[1], the SCA held that the test of reasonable prospects of success postulates 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. These prospects of success must not be remote, but there must exist a reasonable chance of succeeding. An applicant who applies for leave to appeal must show that there is a sound and rational basis for the conclusion that there are prospects of success.

[10]. The ratio in *Ramakatsa* simply followed *S v Smith* 2012 (1) SACR 567 (SCA), [2011] ZASCA 15, in which Plasket AJA (Cloete JA and Maya JA concurring), held as follows at para 7:

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

[11]. In *Mont Chevaux Trust v Tina Goosen*[2], the Land Claims Court held (in an obiter dictum) that the wording of this subsection raised the bar of the test that now has to be applied to the merits of the proposed appeal before leave should be granted. I agree with that view, which has also now been endorsed by the SCA in an unreported judgment in *Notshokovu v S*[3]. In that matter the SCA remarked that an appellant now faces a higher and a more stringent threshold, in terms of the Superior Court Act 10 of 2013 compared to that under the provisions of the repealed Supreme Court Act 59 of 1959. The applicable legal principle as enunciated in *Mont Chevaux* has also now been endorsed by the Full Court of the Gauteng Division of the High Court in *Pretoria in Acting National Director of Public Prosecutions and Others v Democratic Alliance In Re: Democratic Alliance v Acting National Director of Public Prosecutions and Others*[4].

[12]. I am persuaded that the issues raised by the applicants in their application for leave to appeal are issues in respect of which another court is likely to reach conclusions different to those reached by me. I am therefore of the view that there are reasonable prospects of another court making factual findings and coming to legal conclusions at variance with my factual findings and legal conclusions. The appeal, therefore, in my view, does have a reasonable prospect of success.

[13]. There is one last issue which I need to deal with and that relates to two matters which, according to the applicants, were before me in the main application and which I was required to adjudicate on in my judgment, but which were not dealt with in the judgment at all. And those are:

- (a) An interlocutory application by the respondents to strike out certain paragraphs in applicants’ replying affidavit; and (b) A related application under case number 2020-18813, in which ILH applied, on an urgent basis, for interdictory relief against inter alia ILF, Mr Dlamini, the seventh respondent (SQF) and other interested parties. That application was struck off the urgent court roll due to lack of urgency, but, according to the applicants, part B thereof is still pending and, by direction of the Honourable DJP, was supposed to have been dealt with by me. The respondents contend that there was an agreement between the parties that the issues raised in that application were referred to arbitration and were in fact the subject of the arbitral award referred to above. ILH therefore has no intention of pursuing that application any further. It was stated in as many words on behalf of the respondents.

[14]. My omission to deal with these issues is quite clearly a patent error. The intention was always that those issues be dealt with in the main judgment and that I issue orders, at least costs order, in both those applications. The issue in both these applications are straightforward and uncomplicated.

[15]. At the commencement of the hearing of the application on 31 January 2024, the parties informed the court that the respondents do not intend pursuing the interlocutory application. This was confirmed by Mr Cohen, who appeared on behalf of the respondents with Mr Ascar, and who stated unequivocally that the respondents were ‘abandoning’ the said application. I interpret these advices from the respondents’ Counsel as a formal withdrawal of the said application. It follows that the respondents should be ordered to pay the costs of that application.

[16]. As for the second application, neither of the parties took any further steps to have the matter heard. In any event, the issues in that application were overtaken by the present application and the arbitration, which, according to the respondents, was as a result of the parties referring the issues in the urgent application to arbitration. All the same, ILF has no intention of pursuing that application further. The costs incurred subsequent to the matter being struck off the roll are negligible. In the exercise of my discretion, I would order the parties to bear their own costs incurred after the costs order of Twala J on 15 August 2020.

[17]. I therefore intend granting an order in terms of Uniform Rule of Court 42(1)(b), correcting the aforesaid patent error, which is such that it had resulted in an order being granted which did not reflect my real intention when I pronounced the order. The error is clearly attributable to the court itself, and I may therefore mero motu correct what is undoubtedly a error in my order so as to give effect to my true intention.

[18]. As for the application for leave to appeal, as indicated above, leave should be granted.

Order

[19]. In the circumstances, the following order is made:

(1) In terms of Uniform Rule of Court 42(1)(b), the order of the court dated 16 July 2024 is corrected and varied by the addition of the following two orders after prayer (2): -

‘(3) The first, second, third and fifth respondents shall pay the applicants’ costs relating to the first, second, third and fifth respondents’ interlocutory application (dated 31 March

2023) to strike out certain portions of the applicants’ replying affidavit, which application was formally withdrawn by the respondents at the hearing of the main application on 31 January 2024;

(4) In the related application under case number 2020-28813, each party shall bear its own costs incurred after 25 August 2020.’

L R ADAMS

Judge of the High Court

Gauteng Division, Johannesburg

HEARD ON: 31st October 2024 JUDGMENT DATE: 31st October 2024 – Judgment handed down electronically FOR THE APPLICANTS: Adv M E Mathaphuna INSTRUCTED BY: Sibisi & Partners Attorneys, Mbombela FOR THE FIRST, SECOND, THIRD AND FIFTH RESPONDENTS: Advocate Sam Cohen, together with Advocate Clint Ascar and Advocate Abongile Mabensela INSTRUCTED BY: Molepo Incorporated Attorneys, Germiston FOR THE FOURTH RESPONDENT: No appearance INSTRUCTED BY: Ramushu Mashile Twala Incorporated, Strathavon, Sandton FOR THE SIXTH, SEVENTH AND EIGHTH RESPONDENTS: No appearance INSTRUCTED BY: No appearance

- [1] Ramakatsa and Others v African National Congress and Another (724/2019) [2021] ZASCA 31 (31 March 2021);
- [2] Mont Chevaux Trust v Tina Goosen, LCC 14R/2014 (unreported).
- [3] Notshokovu v S, case no: 157/2015 [2016] ZASCA 112 (7 September 2016).
- [4] Acting National Director of Public Prosecutions and Others v Democratic Alliance In Re: Democratic Alliance v Acting National Director of Public Prosecutions and Others (19577/09) [2016] ZAGPPHC 489 (24 June 2016).

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