

SOUTH AFRICA / JUDGMENT

Jumar v Sheriff Pretoria South West and Others (Leave to Appeal) (2024-095168) [2024] ZAGPPHC 1306 (12 December 2024) [2024] ZAGPPHC 1306

COURT

North Gauteng High Court, Pretoria

BEFORE

K La M Manamela

CASE / FILE NUMBER

2024-095168

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

CASE NO: 2024-095168

(1)

REPORTABLE: NO

(2)

OF INTEREST TO OTHER JUDGES: NO

(3)

REVISED.

Date

12 December 2024

K.

La M Manamela

In

the matter between:

JUMAR
ROSTER UKOLEKO
Applicant
and
SHERIFF
PRETORIA SOUTH WEST, S ISMAIL
1st
Respondent
MATAMELA
NELLY
KGABI
2nd
Respondent
EXECUTOR
OF THE ESTATE OF THE LATE
3rd
Respondent
SELAMUDI
JACOB KGABI
LESOLE
MOKGATLE ATTORNEYS
4th
Respondent
MASTER
OF THE HIGH
COURT
5th
Respondent
REGISTRAR
OF DEEDS, PRETORIA
6th
Respondent
DATE

OF JUDGMENT: This judgment is issued by the Judge whose name is reflected herein and is submitted electronically to the parties/their legal representatives by email. The judgment is further uploaded to the electronic file of this matter on Caselines by the Judge's secretary. The date of the judgment is deemed to be 12 December 2024.

JUDGMENT

(APPLICATION FOR LEAVE TO APPEAL)

KHASHANE MANAMELA, AJ

Introduction

[1] On 03 September 2024^[1] I granted an order for urgent interdictory relief ('the Order') in the application brought by Mr Jumar Roster Ukoleko, the applicant, against the respondents cited above ('the main application').

[2] Dissatisfied with the Order Ms Matamela Nelly Kgabi, the second respondent, and Lesole Mokgatle Attorneys, the fourth respondent, brought this application for leave to appeal the outcome or the Order ('the Leave to Appeal').

[3] The grounds for the Leave to Appeal were revised on 30 October 2024. This was after I furnished reasons for the Order on 17 October 2024 ('Reasons for the Order').

[4] The Leave to Appeal was heard virtually on 22 November 2024. Mr TC Kwindi, as before, appeared for the applicant, and Mr TA Modisenyanne appeared this time only for the second and fourth respondents. I reserved judgment

[5] The parties, or counsel on their behalf, in the documents for the Leave to Appeal retained the citation of parties as in the main

application. For example, the applicant in the previous or main application is now the only respondent in this Leave to Appeal, but still referred to as the applicant. I will adopt this approach, whilst collectively referring to the second and fourth respondents, simply as the respondents.

Grounds of appeal (and submissions on behalf of the respondents)

[6] The respondents sought initially leave to appeal to the Supreme Court of Appeal, alternatively the Full Court of this Division against the Order, ostensibly including Reasons for the Order. I will henceforth refer, collectively, to the Order and Reasons for the Order as the Judgment.

[7] But, when appearing virtually at the hearing for Leave to Appeal, Mr Modisenyanne for the respondents submitted that the actual destination of the intended appeal is the Full Court of this Division and not the Supreme Court of Appeal, as stated earlier.

[8] The respondents premised the Leave to Appeal on a multitude of grounds, some of which - with respect - do not necessarily qualify as grounds for an appeal. The aforesaid grounds include the following, quoted verbatim from the respondents revised grounds:

1.3 By finding that there was an appeal against the eviction order, such that the eviction order was suspended. Whereas there was no legal impediment to the implementation of an eviction order where the appeal is defective or has and remains lapsed.

1.4 By finding that the eviction order was suspended pending finalisation of the lapsed appeal. The suspension of the eviction order had elapsed for failure to comply with the Rules, until reinstated by Court following condonation application.

...

1.10 By finding that the Applicant's eviction was an unlawful deprivation of possession. The eviction order was not suspended as the appeal had lapsed hence the Court a quo directed that condonation reinstating same.

3. In addition, there are compelling reasons in terms of section 17(1)(a)(ii) of the Superior Courts Act 10 of 2013, as follows:

3.1 ...

3.2 The property is in arrears to the amount in excess of R250 000.00 ... with the City of Tshwane for utilities and services consumed by the Applicant. The Second Respondent is the registered owner and thus liable for his debt. This is unjust.

3.3 The Second Respondent had obtained a warrant of ejectment which was not obtained from the Sheriff prior to pleading because of the truncated timelines as such, it was not placed before the court a quo.

3.4 An application to present further evidence in the form of the warrant of ejectment and debt as mentioned above, will be made to the appeal court.

[9] It is submitted on behalf of the respondents that the Leave to Appeal is sought on the bases that it has both prospects of success on appeal and compelling reasons in terms of the respondents' revised notice. Reference is also made in the written submissions to the order or judgment of my sister Bam, J in a related matter or application. The events surrounding the application were after the Order was granted and, therefore, cannot ordinarily influence prior events. I, respectfully, disagree that a different conclusion reached in the aforesaid matter denotes prospect of success on appeal against the Judgment. There is no need to say more.

[10] It is also submitted for the respondents that an application to adduce further evidence will be made before the appellate court. This would primarily be on the grounds that the timeframes leading to the hearing of the main application, which was ruled urgent, were unreasonably truncated. This led to the omission by the respondents of the ejectment

warrant and the utility statement from City of Tshwane Municipality relating to the services to the property. The appellate court – imbued with wide powers – may receive further evidence on appeal in special circumstances when it is in the public interest, the submission concludes.[2]

- [11] As I have already mentioned, the respondents rely on many grounds of appeal, but I found those specifically mentioned above most pertinent for purposes of this Leave to Appeal. I shall return to some of these grounds, below, after dealing with the opposition to the Leave to Appeal by the applicant (including submissions made on his behalf), next.

Opposition to the Leave to Appeal (and submissions on behalf of the applicant)

- [12] As already indicated above, the applicant opposes the Leave to Appeal and associate himself fully with the Judgment. It is submitted on behalf of the applicant that there are no reasonable prospects of success on appeal and there are no compelling reasons as to why leave to appeal should be granted. This is in reference to the test for applications for leave to appeal as set out in section 17(1)[3] of the Superior Courts Act 10 of 2013. The respondent or applicant relies in this regard on the decision in *Ramakatsa and others v African National Congress and another*,[4] which, among others, held as follows:

- [10] Turning the focus to the relevant provisions of the Superior Courts Act (the SC Act), leave to appeal may only be granted where the judges concerned are of the opinion that the appeal would have a reasonable prospect of success or there are compelling reasons which exist why the appeal should be heard such as the interests of justice. This Court in *Caratco*, concerning the provisions of s 17(1)(a)(ii) of the SC Act pointed out that if the court is unpersuaded that there are prospects of success, it must still enquire into whether there is a compelling reason to entertain the appeal. Compelling reason would of course include an important question of law or a discreet issue of public importance that will have an effect on future disputes. However, this Court correctly added that ‘but here too the merits remain vitally important and are often decisive’. I am mindful of the decisions at high court level debating whether the use of the word ‘would’ as opposed to ‘could’ possibly means that the threshold

for granting the appeal has been raised. If a reasonable prospect of success is established, leave to appeal should be granted. Similarly, if there are some other compelling reasons why the appeal should be heard, leave to appeal should be granted. 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. In other words, the appellants in this matter need to convince this Court on proper grounds that they have prospects of success on appeal. Those prospects of success must not be remote, but there must exist a reasonable chance of succeeding. A sound rational basis for the conclusion that there are prospects of success must be shown to exist.

[footnotes omitted]

[13] It is, among others, argued as follows on behalf of the applicant:

- (a) the execution of the eviction order granted on 05 October 2023 is invalid, due to the notice of appeal served earlier, and the execution undermines the rule of law and violates the applicant's right in terms of section 34 of the Constitution of the Republic of South Africa, 1996; (b) there is currently no application before this Court for the alleged new evidence and, thus, the alleged new issues or evidence are/is not before this Court or forming part of the consideration for the Leave to Appeal; (c) it is not in the interests of justice for the respondents to bring new issues in the application for leave to appeal after failing to include same in their answering

affidavit; (d) the respondents do not dispute that they were served with notice of appeal in the Magistrates Court proceedings, and (e) the respondents could have used the procedure availed by Rule 60[5] and/or 60A[6] of the Magistrates Court Rules (although I recall counsel inadvertently saying Rules 20 and 30) to address the alleged irregular or non-compliant steps by the applicant in the appeal process in the Magistrates Court proceedings.

[14] For the reasons set out in the applicant's written submissions, including those reflected above and those advanced during the hearing of the Leave to Appeal, it is submitted on behalf of the applicant that the Leave to Appeal should be dismissed with costs on scale C.

Applicable legal principles, including the test for leave to appeal and adducing new evidence on appeal

[15] The primary legal principle applicable to applications for leave to appeal in this Court is in the form of section 17(1) of the Superior Courts Act, which reads as follows in the material part:

(1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that—

(a)

(i) the appeal would have a reasonable prospect of success; or

(ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration ...

[16] The Full Court of this Division (coram: Mlambo JP, Davis JP and Molefe J) in *Democratic Alliance v President of the Republic of South Africa and Others*[7] held as follows with regard to the test for application for leave to appeal:

[4] The test as now set out in s 17 constitutes a more formidable threshold over which an applicant must engage than was the case. Previously the test was whether there was a reasonable prospect that another court might come to a different conclusion. See, for example, *Van Heerden v Cronwright and others* 1985

- (2) SA 342 (T) at 343 H. The fact that the Superior Courts Act now employs the word “would” as opposed to “might” serves to emphasise this point. As the Supreme Court of Appeal said in *Smith v S* 2012 (1) SACR 567 (SCA) at para 7;

‘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] This dictum serves to emphasise a vital point: Leave to appeal is not simply for the taking. A balance between the rights of the party which was successful before the court a quo and the rights of the losing party seeking leave to appeal need to be established so that the absence of a realistic chance of succeeding on appeal dictates that the balance must be struck in favour of the party which was initially successful.
- [6] The second basis upon which leave should be granted is that there is a compelling reason, that is apart from the existence of conflicting judgments on the matter under consideration which require clarification from a higher court. In essence the compelling reason is whether the case raises issues of significant public importance. See *Zuma v Democratic Alliance* 2018
- (1) SA 200 SCA at para 57. But even here caution must be exercised. As Wallis JA said in *Minister of Justice and Constitutional Development v Southern African Litigation Centre* 2016
- (3) SA 317 (SCA) at para 24;

‘That is not to say that merely because the High Court determines the issue of public importance it must grant leave to appeal. The merits of the appeal remain vitally important and will often be decisive.’(our emphasis)

- [17] This Leave to Appeal is significantly mounted on the ground that the appellate court might grant an application for new evidence to be led on appeal. The new evidence or issues in this regard are the warrant of ejectment and the outstanding or unpaid municipal utility bill. Both made an appearance after their omission from the main application. The omission, as stated above, is attributed to the truncated timelines which preceded the hearing of the main or urgent application. It is stated as a ground for appeal that the warrant and huge municipal bill which accumulated in respect of the property and for which the second respondent is liable constitute compelling reasons for granting leave as envisaged in section 17(1)(a)(ii)[8] of the Superior Courts Act.
- [1] The order reflects handwritten and court-stamped date of 05 September 2024 but was made in Court on 03 September 2024 although finalised on the former date.
- [2] *Allpay Consolidated Investment Holdings (Pty) Ltd and others v Chief Executive Officer, South African Social Security Agency and others* 2014
- (1) SA 604 (CC) at 637E–638B.
- [3] Par [15] below for a reading of s 17(1) of the Superior Courts Act.

- [5] Rule 60 of the Rules Regulating the Conduct of the Proceedings of the Magistrates' Courts of South Africa ('Magistrates Court Rules') deals with non-compliance with rules, including time limits and errors
- [6] Rule 60A deals with irregular proceedings.
- [7] Democratic Alliance v President of the Republic of South Africa and others (21424/2020) [2020] ZAGPPHC 326 (29 July 2020).
- [8] Par
- [15] above.
- [9] Andries Charl Cilliers, Cheryl Loots and Hendrik Christoffel Nel Herbstein and Van Winsen: Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa (5th edn, Juta/Jutastat e-publications 2009) RS 23, 2024 at ch39-p1241-1242.
- [10] Section 17(1)(a)(ii) of the Superior Courts Act, quoted in par [15] above.

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