

SOUTH AFRICA / JUDGMENT

Mantsho and Another v Hiroschowitz Flionis Attorneys (Leave to Appeal) (45098/2021) [2024] ZAGPPHC 755 (15 July 2024) [2024] ZAGPPHC 755

COURT

North Gauteng High Court, Pretoria

BEFORE

Trumpie

CASE / FILE NUMBER

45098/2021

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HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO: 45098/2021

- (1) REPORTABLE: NO
- (2) OF INTEREST TO OTHER JUDGES: NO
- (3) REVISED: NO

SIGNATURE:

DATE: 15/07/2024

In the matter between:

ABRAM SONTI MANTSHO First Applicant JULIA MANTSHO Second Applicant

and

HIRSCHOWITZ FLIONIS ATTORNEYS First Respondent

In re:

HIRSCHOWITZ FLIONIS ATTORNEYS Applicant

ABRAM SONTI MANTSHO First Respondent JULIA MANTSHO Second Respondent

ORDER

The following order is made:

1. The Applicants' application for leave to appeal is dismissed.
2. The Applicants are to pay the Respondent's costs on a party-party scale, including costs of counsel on Scale B, in terms of Rule 69 of the Uniform Rules of the High Court (as amended).

JUDGMENT:

LEAVE TO APPEAL

TRUMPIE, AJ

Introduction:

[1] This is an application for leave to appeal against the ex-tempore judgment made by this Court on 31st January 2024.[1] In this judgment, the following was ordered, namely:

1.1 Postponement Application

Application is refused with costs

1.2 Rescission Application

Application is dismissed with costs

[2] I will refer to the parties as Applicants and Respondent as in the application for leave to appeal.

[3] The Applicants requested this Court for reasons for the abovementioned ex tempore judgment in terms of Rule 49(1)(c) of the Rules of this Honourable court.[2]

[4] The reasons for the said ex tempore judgment were delivered on 20th March 2024[3] and it is against this judgment, the Applicants have filed their application for leave to appeal.[4]

[5] The said application for leave to appeal is opposed by the Respondent.[5]

[6]

6.1 This matter was originally set down for hearing on 19th June 2024 at 10:00 on the Teams platform.

6.2 Only the Respondent have filed its heads of argument before the abovementioned date, no heads of argument were filed by the Applicants.

6.3 On the day in question, neither the Applicants nor any representative of the said Applicants logged in at the hearing of the matter. After various telephonic conversations it transpired that the Applicants' legal representative was not available to argue the matter and requested a postponement in this matter.

6.4 As the Court did not want to hear the matter in the absence of the Applicants and/or any of their legal representatives, the said postponement was granted and following order was made:

6.4.1 The matter was to be postponed to 10 July 2024 at 09:30 to be heard on the Teams Platform,

6.4.2 Applicants to file their heads of argument, if any, before 5 July 2024 at 12:00,

6.4.3 Applicants to pay Respondent the wasted costs on party-to-party scale occasioned by the said postponement.

[7] On 10 July 2024 this application for leave to appeal was heard and argued on the Teams platform. Both parties at that time have filed their written submissions[6] and both parties were represented at the hearing of this matter.

Grounds of appeal

[8] The Applicants grounds for leave to appeal[7] were the following, namely:

8.1 The Court erred in finding that:

8.1.1 No case has been made out that other parties have “direct and substantial interest” to the Applicants’ sequestration proceedings.

8.1.2 Furthermore, the Court erred in finding that the same point, albeit in terms of the non-joinder of Mr. Makamo was already adjudicated upon by Sardiwalla J.

8.2 That the Court erred in finding that:

8.2.1 It is not in the best interests of justice that the matter be postponed in order to afford the Applicants herein to supplement their papers.

8.3 That the Court further erred in finding that:

8.3.1 The averments given to explain their reason for being in default, do not meet the test for reasonableness and are therefore not acceptable explanations for their default.

8.4 That the Court further erred in finding that:

8.4.1 That the Applicants did not show that they have a bona fide defence which prima facie will have some prospects of success.

8.5 That the Court ought to have found that:

8.5.1 Amongst other grounds, the Court should have found as at the outset that the sequestration order granted on 06th February 2023, was erroneously sought and granted in that there existed no valid certificate of security alternatively the certificate was stale.

Legal position

[9] The legal basis for leave to appeal is found in section 17(1)(a) of the Superior Courts Act [8] which provides that:

“(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;”

(own emphasis)

[10] After the enactment of section 17(1)(a) of the Superior Courts Act, the Supreme Court of Appeal (“SCA”) in the matter of *S v Kruger*[9] has set out the test for the application for leave to appeal as follows:

*“[2] Before dealing with the merits of the appeal, it is necessary at the outset to deal with the test applied by the high court in granting leave to appeal to this court. Despite dismissing the appellant's appeal, the high court concluded that it was 'possible' that another court might arrive at a different conclusion and that leave to appeal should not be 'lightly refused' where the person concerned is facing a lengthy sentence of imprisonment. This is an incorrect test. What has to be considered in deciding whether leave to appeal should be granted is whether there is a reasonable prospect of success. And in that regard, more is required than the mere 'possibility' that another court might arrive at a different conclusion, no matter how severe the sentence that the applicant is facing. As was stressed by this court in *S v Smith* 2012*

(1) SACR 567 (SCA) para 7:

'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.”

[3] The time of this court is valuable and should be used to hear appeals that are truly deserving of its attention. It is in the interests of the administration of justice that the test set out above should be scrupulously followed. In the present case it was not, and this court has had to hear an appeal in respect of which there was no reasonable prospect of success.”

[11] This test whether to grant leave to appeal or not, was further aptly set out by the SCA in the matter of *Cook v Morrisson and Another*[10] as follows:

“[8] The existence of reasonable prospects of success is a necessary but insufficient precondition for the granting of special leave. Something more, by way of special circumstances, is needed. These may include that the appeal raises a substantial point of law; or that the prospects of success are so strong that a refusal of leave would result in a manifest denial of justice; or that the matter is of very great importance to the parties or to the public. This is not a closed list (Westinghouse Brake & Equipment (Pty) Ltd v Bilger Engineering (Pty) Ltd 1986

(2) SA 555 (A) at 564H – 565E; Director of Public Prosecutions, Gauteng Division, Pretoria v Moabi 2017

(2) SACR 384 (SCA) ([2017] ZASCA 85) para 21.”

[12] It has been held by our Courts that to determine what such reasonable prospects entails, leave to appeal should only be granted when a sound and rational basis for granting such leave to appeal, exists.[11]

[13] In the matter of MEC for Health, Eastern Cape v Mkhintha[12] the SCA held that:

“An applicant for leave to appeal must convince the court on proper grounds that there is a reasonable prospect or realistic chance of success on appeal. A mere possibility of success, an arguable case or one that is not hopeless, is not enough. There must be a sound, rational basis to conclude that there is a reasonable prospect of success on appeal.”[13] (My own emphasis)

[14] To determine if such a sound and/or rational basis exists, a court needs to test the grounds on which the leave to appeal is sought against the facts of the case and the applicable legal principles to ascertain whether an appeal court would interfere in the decision against which leave to appeal is sought.[14]

[15] In light of the above, it is trite when dealing with an application for leave to appeal, leave may only be granted if a Court is of the opinion that the appeal would have reasonable prospects of success or if there are some other compelling reasons. It is therefore clear that if an application for leave to appeal does not have reasonable prospects of success, such leave to appeal should not be granted.

Analysis

[16] In regard to Applicants’ first four grounds for leave to appeal above, no new issues have been raised by the Applicants in their argument for leave to appeal, that has not been adjudicated or heard or dealt with in my original judgment.

[17] In my original judgment, I have dealt with most, if not all the issues raised by the Applicant’s leave to appeal, and it is not necessary for me to repeat those in full. Furthermore, the said reasons for my findings are set out in detail in the said judgment and it serves no purpose to rehash same here.[15]

- [18] Suffice to restate what I said in my judgment, namely that, in my view, that the Applicants did not make a case of why the other parties have a substantial and material interest to the said Applicants' sequestration proceedings, nor did the Applicants do not make out a case that the non-joinder of Mr. Makamo was not adjudicated by Sardiwalla J previously.
- [19] Furthermore, no valid and/or compelling reasons were offered by the Applicants that either that it was not to the interest of justice not granting a postponement allowing the Applicants to supplement their papers, nor that my discretion was wrongly exercised in dismissing the said rescission application.
- [20] Lastly, the Applicants however did raise a new point in respect of the certificate of tendered security that at the time of granting the said sequestration order, said certificate of tendered security was not valid, alternatively stale.

20.1 This new point mentioned in Applicants' leave to appeal was neither addressed nor argued nor contained in any of Applicants' papers either at the hearing of the sequestration application before Sardiwalla J in October 2022 or before Greyvenstein AJ in February 2023, or before me at the hearing of this matter on 31 January 2024.

20.2 In any event, section 9(3)(b) of the Insolvency Act[16] prescribes as follows:

“(b) The facts stated in the petition shall be confirmed by affidavit and the petition shall be accompanied by a certificate of the Master given not more than ten days before the date of such petition that sufficient security has been given for the payment of all fees and charges necessary for the prosecution of all sequestration

proceedings and of all costs of administering the estate until a trustee has been appointed, or if no trustee is appointed, of all fees and charges necessary for the discharge of the estate from sequestration.”

20.3 Having regard to the above, such certificate of tendered security must be given no more than ten (10) days before the date of a petition.[17]

20.4 In the matter of Court v Standard Bank of SA Ltd; Court v Bester No and Others[18] the Supreme Court of Appeal (“SCA”) stated that the purpose of the certificate of security was not to protect the respondent but was rather for the costs of the administration of the Master and the Sheriff and that it was not security for the respondent's costs of opposition.

20.5 The SCA held further in the abovementioned matter that the certificate did not need to be attached to the application when it was served and, more importantly for the purposes of this matter, that it did not even have to be in existence when the application was served.[19]

20.6 It was further held by the SCA that the certificate of security did not have to be served and provided the certificate was given by the Master during a period which commenced ten days before the date of the application and was available when the matter was heard, then the subsection has been complied with.[20]

20.7 In casu, the petition (Respondent's Notice of Sequestration) was dated 06th September 2021, and the certificate of tendered security obtained from the Master of High Court, Pretoria was dated 15th December 2021, no more than ten (10) days before the date of the said application for sequestration of the Applicants and was available at the time of the hearing of this matter in October 2022, thus fully complying with the said Act.

20.8 In light of the above, and after perusing the said papers filed herein, I find that the certificate of tendered security was in fact valid, and that the Respondent complied with the requirements of the Insolvency Act. Therefor the said point of the Applicants leave to appeal is without merit, cannot succeed and is hereby dismissed.

[21] Furthermore, I have carefully considered the authorities referred to, and although there could be in certain circumstances, be different interpretations, however, I am of the view that I have interpreted and applied the authorities referred to correctly.

[22] Therefore, after careful consideration, I hold the view that there is no reasonable prospect that another Court would come to a different conclusion, or would interfere with the order made, presented with the same facts.

[23] Therefore, I am of the view that the criterion or threshold set in section 17(1) (a) of the Act was not met by the Applicants and that the said application for leave to appeal should therefore be dismissed.

Costs

[24] The normal principle of cost orders is that the successful party should be reimbursed for the cost occurred in the litigation.

[25] I find no reason why there should be any deviation from the normal principle and the Applicants in the application for leave to appeal is ordered to pay the costs of the Respondent in the application for leave to appeal.

Order:

In the result, I make the following order:

Trumpie AJ

Date Hearing: 10th July 2024

Date of Judgment: 15th July 2024

Appearances:

Advocate for the Applicant: Adv E Dreyer

Advocate's Group 21, Sandton

Instructed by Hirschowitz Flionis Attorneys

Advocate for the First and Second Respondents: Mr Leshabana

Instructed by Leovi Leshabana Incorporated Attorney

- [1] See CaseLines, Order dated 31 January 2024, 000-1
- [2] See: CaseLines, Request for reasons, 038-1 to 038-4
- [3] See: CaseLines, Reasons for ex tempore judgment, 039-1 to 039-32
- [4] See: CaseLines, Leave to Appeal, 040-1 to 040-4
- [5] See: CaseLines, Notice to oppose leave to appeal, 040-5 to 040-6
- [6] See: CaseLines, Applicants HOA, 45-1 to 45-4; Respondent's HOA, 42-1-42-12
- [7] See: CaseLines Application for leave to appeal, 40-1 to 40-4
- [8] Act 10 of 2013.
- [9] 2014
- (1) SACR 647 (SCA) at par. 2
- [10] 2019
- (5) SA 51 (SCA) at par. 8
- [11] See: Erasmus, D-105.
- [12] Unreported, SCA case 1221/2015, dated 25 November 2016.
- [13] Paragraph 17 thereof. See S v Smith 2012 (1) SACR 567 (SCA) above at par. 7.
- [14] See: Four Wheel drive Accessory Distributors CC v Rattan NO 2019 (3) SA 451 (SCA) at par [34] & Independent Examinations Board v Umalusi (Unreported, GP case 83440/2019, dated 07 January 2021, at par. [2] to [4]. See discussion in Erasmus, D-105
- [15] See: CaseLines, Reasons for ex tempore judgment, 039-1 to 039-32
- [16] Insolvency Act 24 of 1936
- [17] See section 9(3)(b) of the Insolvency Act
- [19] See Court case, p 123
- [20] See Court case, p 131

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