

SOUTH AFRICA / JUDGMENT

Ndlovu v Matsipa and Others (Leave to Appeal) (24564/2022) [2024] ZAGPPHC 759 (1 August 2024) [2024] ZAGPPHC 759

COURT

North Gauteng High Court, Pretoria

BEFORE

JF Grobler

CASE / FILE NUMBER

24564/2022

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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 24564/2022

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

Date: 1 August 2024

Signature:

In the matter between:

FRED NDLOVU

Applicant

and

HALEKOPANE MATSIPA

First Respondent

PHESOLO JACKSON MPHAFUDI

Second Respondent

THEKISO MZWANDILE SELELE

Third Respondent

GRANT SEAN NEWTON

Fourth Respondent

JUDGMENT:

APPLICATION FOR LEAVE TO APPEAL

GROBLER AJ:

1. The applicant applies for leave to appeal to the Supreme Court of Appeal, alternatively to the Full Court against the whole judgment and orders that were granted on 2 May 2024, but excluding that part of the judgment relating to the dismissal of the applicant's application for the respondents to be found in contempt of court for failing to comply with an order that was granted in the applicant's favour previously dated 3 February 2016.
2. The respondent submitted that the applicant's application for leave to appeal does not meet the requirements of such an application and referred me to *inter alia* *Songono v Minister of Law and Order* 1996 (4) SA 384 (E). There is some merit in the applicant's contention, but the High Court Constitutionally has the inherent power to protect and regulate its own process, the primary function of the rules of court being the attainment of justice (*vide* Section 173 of the Constitution, *Mukaddam v Pioneer Foods (Pty) Ltd and Others* 2013 (5) SA 89 (CC)). The application for leave to appeal does not in my view amount to an abuse of the court's processes and I am inclined to consider the application within the boundaries of the findings of fact and rulings of law referred to in the applicant's application and in so far as it clearly and in unambiguous terms fully and properly informed the respondent exactly what the case was that had to be met.
3. The applicant relies on section 17(1)(a)(i) of the Superior Courts Act 10 of 2013, contending that the appeal would have a reasonable prospect of success. The Respondent does not contend that leave to appeal should be granted on the basis of there being some other compelling reason why the appeal should be heard as contemplated in section 17(1)(a)(ii) . It was not argued that there are conflicting judgments on any of the matters under consideration, that there is an important point of law under consideration or that there is an issue of public importance in point.
4. I have had regard to the established principles relating to the court's duty in applications for leave to appeal as set out in *inter alia* *Shinga v The State & Another (Society of Advocates (Pietermaritzburg Bar intervening as Amicus Curiae); S v O'Connell & Others* 2007 (2) SACR 28 (CC) at [53] and *In S v Smith* 2012 (1) SACR 567 (SCA). It is not necessary to re state these wellknown principles here.

5. As stated in *MEC Health, Eastern Cape v Mkhitha* (2016) ZASCA 176 (25 November 2016), leave to appeal may only be granted if there truly is a reasonable prospect of success, or if there is some

other compelling reason why it should be granted. Leave to appeal should not be granted unless there is a sound, rational basis to conclude that there is a reasonable prospect of success on appeal.

The applicant's shareholding in Sechaba Group Holdings (Pty) Ltd):

6. The applicant contends that I erred in finding that the applicant failed to place me in a position to hold that the applicant was a shareholder of Sechaba after 2005.
7. The contention is proffered on the proposition that I ignored evidence presented by the applicant in support of such a finding.
8. The applicant relies on two documents attached to the founding affidavit, namely:

7.1 Annexure "MHM05", a letter from Ithemba dated 28 August 2015; and

7.2 Annexure "MHM09", a letter from the applicant's attorneys of record dated 1 August 2017.

9. The letter from Ithemba (annexure "MHM05"), the erstwhile company secretary of Sechaba, serves to confirm the shareholding in Sechaba according to their records on the date of the document. The first respondent's response to the applicant's reliance on the letter of Ithemba was that Ithemba's letter is hearsay evidence, inadmissible and outdated and that the applicant conceded that the list is old and outdated in a letter to Ithemba dated 6 April 2021.

The Applicant in fact held the view that the records of Ithemba were old and outdated in Annexure "MHM11".

10. The letter from the applicant's attorneys of record dated 1 August 2017 (Annexure "MHM09") was marked "Without prejudice" and contained proposals for settlement without admission of liability, it clearly formed part of genuine settlement negotiations made without prejudice to the rights of Sechaba. The respondent referred me in this regard to the matter of *Groep v WJ Da Grass Attorneys and Another* 2018 (5) SA 248 (WCC), par 31 and further.
11. The applicant instituted the present matter against the respondents in 2022, i.e. long after the dates of the aforementioned letters.
12. At the time of instituting the present matter, the applicant was well aware of the fact that the respondents held the view that he was not entitled to the dividends that he was claiming because they were disputing his shareholding. That much he acknowledged unambiguously in the founding affidavit (vide paragraphs 3.12 and 6.4 thereof).
13. The applicant was well aware that he bore the onus of proving that he was a shareholder of Sechaba after 2005 when he instituted proceedings against the applicants on application.

14. In considering whether there is a reasonable prospect or realistic chance of success on appeal, the applicant, for understandable reasons, does not contend that I should ignore the respondent's evidence relating to the applicant's shareholding. I have referred to the respondent's evidence on this issue fully in my judgment dated 2 May 2024.
15. The applicant does not take issue (in the application for leave to appeal) with my finding that the dispute regarding the applicant's shareholding should be determined on a consideration of the facts stated by the first respondent together with the facts alleged by the applicant which are admitted by the first respondent, unless the respondent's version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, or is so farfetched or so clearly untenable or so palpably implausible as to warrant its rejection merely on the papers.
16. The applicant also does not take issue (in the application for leave to appeal) with my finding that the respondent's version does not consist of bald or uncreditworthy denials, does not raise fictitious disputes of fact, and is not so farfetched or so clearly untenable or so palpably implausible as to warrant its rejection merely on the papers.
17. I am, having thoroughly considered the applicant's argument, not persuaded that there is a reasonable prospect or realistic chance that another court may find that the facts stated by the first respondent together with the facts alleged by the applicant which are admitted by the first respondent would justify an order that the applicant remained a shareholder of Sechaba after 2005.

Prescription of the applicant's claim:

18. There is no merit in the applicant's argument that he did not have knowledge of the required facts upon receipt of the financial statements by no later than 9 January 2017. The applicant obtained knowledge of no further facts relating to the claim for arrear dividends after that date, yet he considered himself able to formulate and instituted his claim in that regard by issuing the application on 5 May 2022.
19. In light of my finding that the applicant failed to discharge the onus of proving that he was a shareholder of Sechaba after 2005 and that there is no reasonable prospect or realistic chance that another court may come to a different conclusion, the issue of prescription of the claim for the payment of arrear dividends for the period after 2005 in any event does not arise and it is unnecessary to deal with this ground of the applicant's application for leave to appeal any further.

The claim to be provided with documents previously requested from Sechaba in terms of PAIA and for Sechaba's financial statements for the 2021 financial year and certain documents relating to the period between 15 October 2021 and 31 December 2021:

20. There is no evidence that the documents previously requested from Sechaba in terms of PAIA, Sechaba's financial statements for the 2021 financial year and the specified documents of Sechaba relating to the period between 15 October 2021 and 31 December 2021 are in the custody of all of the respondents jointly or any of the respondents individually, or that they have access to the records.
21. The application against the respondents were instituted after Sechaba had been deregistered and the applicant should have presented evidence to support the relief claimed against the respondents.
22. Furthermore, in light of my finding that the applicant failed to discharge the onus of proving that he was a shareholder of Sechaba after 2005 and that there is no reasonable prospect or realistic chance that another court may come to a different conclusion on that issue, the applicant has no clear right to obtain the financial statements of Sechaba for the 2021 financial year and the specified documents relating to the period between 15 October 2021 and 31 December 2021.
23. There is accordingly no reasonable prospect or realistic chance that another court may come to a different conclusion regarding the claims against the respondents to be provided with the documents previously requested from Sechaba in terms of PAIA and for Sechaba's financial statements for the 2021 financial year and the specified documents

The claim for the respondents to be declared delinquent directors:

24. In light of my finding that the applicant failed to discharge the onus of proving that he was a shareholder of Sechaba after 2005 and that there is no reasonable prospect or realistic chance that another court may come to a different conclusion, there is also no reasonable prospect or realistic chance that another court may come to a different conclusion regarding the issue of the applicant's locus standi to bring an application to declare the respondents delinquent or to place the respondents under probation in terms of section 162 of the Companies Act, Act 71 of 2008.

Conclusion:

25. For the reasons set out above the application for leave to appeal should be and is hereby dismissed with costs, the costs of counsel to be taxed on scale C referred to in rule 69(7) of the rules of court.

DATED AND SIGNED AT PRETORIA ON THE 1ST DAY OF AUGUST 2024.

JF GROBLER

Acting Judge High Court of South Africa

Gauteng Division

Pretoria

Counsel for Applicant: Adv T Mphahlane Instructed by: Madima Attorneys Inc Counsel for Respondents: Adv AW Pullinger Instructed by: Webber Wentzel

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Prepared on 14 October 2026 · Esheria