

SOUTH AFRICA / JUDGMENT

Outsource Mavhine Services (Pty) Ltd and Others v Eugene Swart t/a Outdoor Motoring and Others (Leave to Appeal) (3853/2022)

[2024] ZAMPMHC 4 (9 January 2024)

[2024] ZAMPMHC 4

COURT

Middelburg High Court, Mpumalanga

BEFORE

MBG Langa

CASE / FILE NUMBER

3853/2022

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IN THE HIGH COURT OF SOUTH AFRICA

MPUMALANGA DIVISION (MIDDELBURG LOCAL SEAT)

CASE NO:3853/2022

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

DATE: 09/01/2024

SIGNATURE

In the matter between:

OUTSOURCE MAVHINE SERVICES (PTY) LTD

FIRST APPLICANT

DENVER FOUCHE

SECOND APPLICANT

JOHANNIE FOUCHE

THIRD APPLICANT

And

EUGENE SWART T/A OUTDOOR MOTORING

FIRST RESPONDENT

MAMATOLA CONSTRUCTION AND PROJECTS CC

SECOND RESPONDENT

IMBUMBA JOINT VENTURE (PTY) LTD

THIRD RESPONDENT

JUDGMENT:

APPLICATION FOR LEAVE TO APPEAL

LANGA J:

Introduction

and facts

[1] This is an application for leave to appeal the judgment and order handed down by this court on 19 November 2023, against the Applicants to return certain mining equipment to the First Respondent. The First Applicant is Outsource Machine Services (Pty) Ltd, ('OMS'), the Second Applicant is Denver Fouche and the Third Applicant is Johannie Fouche. The Second and Third Respondents in this application, Mamatola Construction and Projects CC and Imbumba Joint Venture (Pty) Ltd, were the Fourth and Fifth Respondents in the main application and also represented by the Second Applicant Denver

Fouche. Although the order was made against all the Applicants in this this application, only the Second and Third Applicants seek

leave to appeal the order for the return of the mining machinery to the Respondent. No leave is sought against the finding that OMS is in possession of the machinery. Notwithstanding this, the Fourth and Fifth Respondents are also cited in this application for leave to appeal as the Second and Third Respondents.

Applicable legal principles

[2] It is trite that applications for leave to appeal are now governed by the provisions of Section 17(1) of the Superior Courts Act 10 of 2013 which provides as follows:

"17 Leave to appeal

(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; (my underlining for emphasis).

- (b) the decision sought on appeal does not fall within the ambit of section 16(2)(a); and
- (c) where the decision sought to be appealed does not dispose of all the

issues

in the case, the appeal would lead to a just and prompt resolution of the real issues between the parties.”

- [3] The test in such applications has changed substantially from the test ordained in terms of the repealed Supreme Court Act 59 of 1959. The current standard is captured succinctly in the case of *The Mont Chevaux Trust (IT2012/28) v Tina Goosen and Others* LCC14R/2014, (3 November 2014) at para 6 in which the Court stated that “the threshold for granting leave to appeal against a judgment of a High Court has been raised in the new Act and that in terms of the former test the question was whether or not there was a reasonable prospect that another court might come to a different conclusion, See *Van Heerden v Cronwright and Others* 1985 (2) SA 342 (T) at 343H. The use of the word “would’ in the new statute is indicative of a measure of certainty that another will differ from the court whose judgment is sought to be appealed against.”
- [4] This position has since been confirmed in other Divisions of the High Court and it is therefore trite that the current section is now more burdensome than its predecessor. *Smith J in the Valley of the Kings Thaba Motswere (Pty) Ltd* [2016] ZAECGHC 137 (10 November 2016) acknowledged the new standard created by section 17 but added that the contextual construction of the phrase “reasonable prospect of success’ still requires of the judge, whose judgment is sought to be appealed against, to consider, objectively and dispassionately, whether there are reasonable prospects that another court may well find merit in argument advanced by the losing party.”
- [5] In *Hunter v Financial Services Board* 2017 JDR 0941 (GP) it was held that leave to appeal may only be granted if the court of first instance is of the opinion that the appeal would have reasonable prospects of success or is arguable. There must therefore be merit in the applicant’s argument in support of the application for leave to appeal and the applicant must satisfy the court that the appeal would, not might, have reasonable prospects of success either on facts or the law. Furthermore, the peremptory provisions of Rule 49 (1) (b) require a litigant in an application of this nature to clearly and succinctly set out the grounds of appeal in unambiguous terms. *Songono v Minister of Law and Order* 1996 (4) SA 384.

Grounds for leave to appeal

- [6] The Second and Third Applicant's application for leave to appeal is based on very narrow grounds. Firstly, the Applicants challenge the finding that they are in possession of the mining machinery in question and the consequent order that they should return the said machinery to the First Respondent. They contended in this regard that the court erred in failing to take into account that there was no objective evidence that they, (the Second and Third Applicants) were in possession of the property in question. They contended therefore that considering this fact, the court order would be unenforceable as against the Second and Third Applicant. The applicants further contended that the court erred in making a finding that the First Respondent was entitled to the return of the machinery despite the absence of objective evidence that it owned the machinery.
- [7] During the submissions counsel for the Applicants Adv. BD Stevens argued that the order granted against the Second and Third Applicants was superfluous and that they may be held in contempt in circumstances where they are not in possession of the machinery. Although this was not raised as one of the grounds of appeal, counsel further argued that the Second and Third Applicants were misjoined in the application as the only contracting party was the company, OMS. They contended further that in the light of the finding that the agreement was entered into between Swar and OMS, the Second and Third Applicants could not be said to have been in possession of the machinery as they were not the contracting parties in the said agreement.

- [8] Counsel for the First Respondent Adv. N Fourie argued that the allegation of possession by all the Applicants was made in the First Respondent's papers in the main application and that it was never denied and raised as an issue in the papers. She contended further that likewise, the issue of ownership was dealt with in the papers and ownership established as the Applicants could not successfully challenge the evidence that the First Respondent purchased the machinery before it was handed over to OMS.

Analysis

- [9] It is common cause that when OMS entered into the agreement concerning the machinery in question, it was represented by the Second Applicant, Denver Fouche, in his personal and his representative capacity. Denver Fouche incidentally also happens to be the husband to the sole director of OMS, Johannie Fouche, and both reside at the registered address of OMS.

- [10] While it is contended by the Applicants that they did enter into the agreement, it is not denied that the application was based on the common law *rei vindicatio* which can be brought by an owner against any one in possession of their property or thing. Therefore, the question whether or not the Second and Third Applicants were parties to the agreement is irrelevant for the purposes of the *rei vindicatio*. What is important is whether they were in possession of the machinery.
- [11] At the risk of repeating what is already in the judgment, it must be pointed out that as regards the possession, the court accepted the uncontroverted evidence that Denver Fouche and Johannie Fouche were, together with OMS, in possession of the machinery in question. As Johannie Fouche was the sole director of OMS, it must follow that she is the natural person who can be physically in possession of the mining equipment on behalf of OMS which was, admittedly, conducting mining operations together with the Second Respondent, Mamatola Construction. Possession by Johannie Fouche is therefore unquestionable, and the court correctly found that as director of the company she was in possession of the machinery.
- [12] Concerning Denver Fouche, there is also undisputed evidence that he acted on behalf of OMS in the agreement. In the light of the fact that the application is based on the *rei vindicatio*, all that Denver Fouche needed to do to resist the *rei vindicatio* application was to deny possession of the machinery. It is evident from the papers that he was focused on the challenging the agreement and did not deny possession. While it is now contended that he was not in possession of the equipment, Denver Fouche, however, never denied that he was in possession of the equipment despite the allegations that he was. He also never denied the correspondence between him and Swart regarding the return of the machinery. Although the Second Respondent is not a director of OMS, it is evident that he was involved in the running thereof together with the Third Applicant. The evidence that he is in possession of the keys to the machinery was accepted by court and there can therefore be no doubt that he was or is in possession of the machinery. In any event if he was not in possession, he should have stated that in his papers which he did not. Likewise, the finding that he was in possession is therefore based on solid grounds.
- [13] Further, the fact that the order against OMS is not appealed against means that the finding against it is accepted by the Applicants. The court order made against the Second and Third Applicants for the return of the mining machinery was on the basis of the acceptance of the evidence that they, together with OMS, were in possession thereof. The contention therefore by the Second and Third Applicants that the order against them to return the property is superfluous, has no merit and stands to be dismissed.
- [14] Further, concerning ownership, the court made a finding that the First Respondent's claim of ownership on the property has been established. The Applicants could not successfully refute the First Respondent's evidence that it bought the machinery in question and that it therefore belongs to it. The only challenge the Applicants mounted in the main application was in relation to the nature and consequences of the agreement and not the ownership per

se. For the reasons stated in the judgment the argument that because the machinery was not registered in terms of the National Road Traffic Act does not justify a conclusion that the First Respondent is not the owner. What cannot be denied by the Applicants is that the Respondent purchased the machinery, and this was in fact admitted by the Applicants. On the basis of this undisputed

evidence, it should be accepted that the First Respondent is the owner of the machinery unless evidence to the contrary is proven. The application for the return of the mining equipment, which was based on the *rei vindicatio*, was therefore correctly granted against all the Applicants.

Conclusion

[15] In conclusion, the test in an application for leave to appeal is whether there are prospects of success on appeal. The Applicants therefore had to demonstrate that the appeal would have a reasonable prospect of success. The Applicants have in my view failed to satisfy the court that the appeal would, not might, have reasonable prospects of success either on facts or the law. After having objectively considered whether there are reasonable prospects that another court may find merit in argument advanced by the Applicants, I find that the application for leave to appeal should fail as there is no reasonable prospect that another court would come to a different conclusion. The application accordingly stands to be dismissed with costs.

Order

[16] In the result I make the following order:

The application for leave to appeal is dismissed with costs.

MBG LANGA

JUDGE OF THE HIGH COURT

Appearances:

For the Applicant: Advocate N Fourie For the Respondent: Advocate BD Stevens

Heard on 1 December 2023

Judgment

delivered on 9 January 2024

This judgment was handed down electronically by circulation to the parties' representatives by email. The date for hand-down is deemed to be the 9 January 2024 at 15h15.

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Prepared on 11 October 2026 · Esheria