

SOUTH AFRICA / JUDGMENT

**Power Guarantees (Pty) Ltd v Set Square
Developments (Pty) Ltd and Others
(26234/2021)
[2024] ZAGPJHC 291 (18 April 2024)
[2024] ZAGPJHC 291**

COURT

South Gauteng High Court, Johannesburg

BEFORE

G S Myburgh

CASE / FILE NUMBER

26234/2021

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

Case Number: 26234/2021

1.

REPORTABLE: YES / NO

2. OF

INTEREST TO OTHER JUDGES: YES/NO

3.

REVISED:

YES/NO

In

the matter between: POWER
GUARANTEES (PTY) LTD
Applicant
and
SET
SQUARE DEVELOPMENTS (PTY) LTD
First Respondent
VAHWA
CONSTRUCTION (PTY) LTD
Second Respondent
SHERIFF
OF THE HGH COURT (JOHANNESBURG SOUTH) Third
Respondent

In re: SET
SQUARE DEVEOPMENTS (PTY) LTD
Applicant
POWER
GUARANTEES (PTY) LTD
First Respondent
VAHWA
CONSTRUCTION (PTY) LTD
Second Respondent

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the parties/their legal representatives by e-mail and by uploading it to the electronic file of this matter on Caselines The date and for hand-down is deemed to be 18 April 2024.

JUDGMENT

MYBURGH, AJ

[1] This matter concerns an application to stay the execution of a judgment granted by my brother Kumalo J on 6 October 2022 in terms of which he ordered the current first respondent (“Power”) to pay to the applicant (“Set Square”) an amount of R 1 940 290.78, being an amount which had been claimed in terms of a bond which had been issued in connection with certain construction work. In terms of that order, two other claims which had been made, in the amounts of R 1 999 875.19 and R 3 333 500.57 respectively, were dismissed. Paragraph “3” of the order read “In the light of the fact that applicant is successful on one of its claims, applicant shall pay two thirds of the costs of the respondents”.

- [2] On 27 October 2022, Set Square, delivered a notice of application for leave to appeal, as required by Uniform Rule 49(1), in respect of the two claims that were dismissed and the order of costs (i.e. paras 2 and 3 respectively). The notice listed a number of grounds; however, I shall not discuss them as it is not necessary for present purposes.
- [3] On 9 November 2022, Set Square’s attorney addressed a letter of demand to the current applicant demanding payment in terms of paragraph 1 of the order.
- [4] On the following day, 10 November 2022, Power delivered a document styled “First Respondent’s Conditional Application for Leave to Cross Appeal”. In the body of the notice, it was stated that leave to cross appeal was being sought only in the event of Set Square being granted leave to appeal and “out of an abundance of caution”. The only ground of appeal stated (if it can be described as such) is that the learned judge erred in finding that Power was liable to pay the amount in question – i.e. the complaint was directed solely at the outcome. Having regard to the time periods stipulated in Rule 49(1)(b), that notice was delivered one day out of time. It follows that its reception would have required an application for condonation.
- [5] The application for leave to appeal was heard by my brother Kumalo J on 29 November 2022. The heading of the transcript records that the applicant was Set Square, and that Power was the first respondent. Set Square was, on that occasion, represented by a Mr Steyn and the current applicant was represented by a Mr Kgomo. The papers in this matter include a transcript of those proceedings. I will deal briefly with what transpired in the paragraphs which follow.
- [6] Mr Steyn addressed Set Square’s application with reference to the grounds listed in its notice of application for leave to appeal. The central thrust of his argument related to differences in approach by courts in different divisions in relation to performance bonds and similar instruments. In short, his case was that that payment should also have been ordered in respect of Set Square’s other claims and that Set Square should have been awarded all costs. Leave was sought to appeal to the Supreme Court of Appeal (“the SCA”).
- [7] Mr Kgomo, who appeared for Power, argued that Set Square’s application should not be granted; this, *inter alia*, as it should not be permitted to both enforce and seek to appeal against the same order – a submission which, as the court was quick to point out, was flawed given that the order which Set Square was seeking to enforce was separate and distinct from the orders which it was seeking to have overturned. He also touched on some of those authorities which have bearing on the nature of a guarantor’s obligations in respect of bonds of the kind in issue. In relation to the cross appeal, all that he said was, “following the submission of that letter of demand we filed a notice of appeal of the first decision just as an abundance of[1] ...to the extent that your Lordship is inclined to grant leave to appeal, and we just did not want to run into problems where we are accused of not having done so... However we do understand that it gives us the right to cross appeal”. There was no application for condonation of the late delivery of Power’s application for leave to cross

appeal. The content of the application for leave to cross appeal was also not addressed. Indeed, it seems that Mr Kgomo was under the impression that a right to cross appeal would arise automatically in the event of Set Square's application being upheld and hence that a separate application had not, strictly speaking, been required. Why he would have believed that is somewhat puzzling given that it is settled law that it is not so;^[2] however that he held that belief seems to be beyond doubt. Whatever the reason may have been, he neither moved an application for leave to (cross) appeal nor addressed any argument in support thereof – which would have posed something of a challenge given that no grounds were listed in the notice.

- [8] Judgment in respect of the application for leave to appeal was handed down on 16 January 2023. Kumalo J stated that he was of the view that Set Square would have a reasonable prospect of success on appeal and made the following order/s:
1. Leave to appeal is granted to the Supreme Court of Appeals; and
 2. Costs will be costs in the appeal.
- [9] Set Square thereafter took the steps required to prosecute its appeal, which is currently pending.
- [10] Set Square also took steps to execute, in respect of paragraph 1 of the original order – i.e., payment of the amount of R 1 940 290.78. Those steps included the issuing of a warrant of execution against movables, which the Sheriff then set about executing. Those actions precipitated the current application in which Power seeks the setting aside of a warrant of attachment and an interdict prohibiting Set Square and the Sheriff from enforcing the order, “pending the finalisation of the appeal of the entirety of the judgment of his Lordship the Honourable Judge Kumalo on 6 October 2022”.
- [11] Back tracking, Power also attempted to prosecute an appeal; however, its notice of appeal was returned to it with a note or endorsement from the registrar of the Supreme Court of Appeal to the effect that the notice was not in order, given that Power had not been granted leave to appeal. Those efforts accordingly bore no fruit.
- [12] To complete the history, Power's attorney wrote a letter to Kumalo J on 3 March 2023. In that letter, the submission was advanced that given the circumstances, the word “applicant”, must have been intended to refer to both Set Square and the current applicant, and the learned judge was requested to clarify the meaning of the order. According to the papers, no substantive response has ever been forthcoming. Power has accordingly not been able to either prosecute its cross appeal in the ordinary way or to address an application for leave to appeal to the Supreme Court of Appeal.
- [13] In the course of argument, I was addressed at length regarding the meaning to be accorded to sub section 18(1) of the Superior Courts

Act[3] (“the Act”) and the obligations of parties in terms of Uniform Rule 49. The two main arguments which were advanced on behalf of the applicant in this regard were that : a) the effect of sub section 18(1) of the Act is to suspend all orders made pursuant to a judgment; and b) a notice of application for leave to cross appeal cannot, strictly speaking, be out of time - given that the rules do not stipulate a time period for the delivery of such notices. I deal with these arguments tersely in the paragraphs which follow.

- [14] As to the first issue, the position in casu is that there were three distinct orders. The first favoured Set Square and the two remaining orders favoured Power. Set Square’s application for leave to appeal was aimed solely at the second and third orders; it did not seek to overturn the first order. It follows that the delivery of a notice of application for leave to appeal by Set Square had no effect as far as that order was concerned. The same is true of the appeal, which is currently pending at its instance.
- [15] The second assertion is equally flawed. While it is true that the Uniform Rules do not specifically stipulate the period within which an application for leave to cross appeal must be delivered, it is settled that the rules which apply in respect of applications for leave to appeal apply equally to applications for leave to cross appeal.[4] While it may be so that a desire to cross appeal may, in some cases, only be prompted by the delivery of an application for leave to appeal and hence result in the application for leave to cross appeal being delivered late, that is a matter which can and should be dealt with by way of an application for condonation.
- [16] The real issue is whether the order granting leave to appeal is to be construed as meaning that both the Set Square’s application for leave to appeal and the applicant’s application for leave to cross appeal were granted, or in some other way. The other alternatives are that: a) Set Square’s application was granted (which it clearly was) and the applicant’s application was dismissed; and b) the presiding judge simply overlooked the applicant’s application for leave to cross appeal - i.e. did not apply his mind to it. A further question which might potentially arise is whether, assuming the latter scenario, the applicant’s application for leave to cross appeal falls to be regarded as still pending.
- [17] Given that the judgment and orders are silent in relation to the application for leave to cross appeal, a reading of those documents, taken on their own, suggests that the application for leave to cross appeal was simply overlooked. That said, and as I have already pointed out, the transcript of the proceedings indicates that Mr Kgomo neither formally moved the application nor advanced any arguments in support of the thesis that Kumalo J had erred in granting the first order (i.e. the order which favoured Set Square). He also did not seek condonation in respect of the late delivery of the current applicant’s notice which, as I have indicated, would have been necessary in order for Power’s application to be heard. I am accordingly of the view that the order of 16 January 2023 falls to be construed as referring solely to Set Square’s application for leave to appeal.

[18] The requirements for an interim interdict are well known. They are a) what is often referred to as a “prima facie right”; b) continuing harm or a well-grounded apprehension of harm; c) the absence of a satisfactory alternative remedy; and d) a balance of convenience in favour of the applicant. All of the requirements must be satisfied; albeit that a strong balance of convenience can, to a degree, make up for a weakness regarding the existence of the right contended for. These requirements are so well established as not to require any authority.

[19] In casu, the applicant fails at the first hurdle. Its application for leave to cross appeal was neither moved nor granted. In my view, it is also no longer pending.

[20] I accordingly make the following order.

Order

1. The application is dismissed with costs.

G S MYBURGH

ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

Date of Hearing: 2 August 2023

Date of Judgment: 18 April 2024

Appearances

For the Applicant: Adv K Naidoo instructed by C De Villiers Attorneys

Inc

For the First Respondent: Adv H Wessels instructed by Roelf Nel Attorneys

[1] The transcript reads “indistinct”, but it seems clear that the missing word is or was “caution”.

[2] By way of example, see *Gentiruco AG v Firestone SA (Pty) Ltd* 1972 (1) SA 589 (A) at 608A.

[3] Act 10 of 2013.

[4] Harms *Civil Procedure in the Superior Courts* SI 78 (2023) at B49.5 and authorities cited therein.

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Prepared on 14 October 2026 · Esheria