

SOUTH AFRICA / JUDGMENT

Prinsloo and Others v Development Bank of Southern Africa Ltd (Leave to Appeal) (63387/2020) [2024] ZAGPPHC 1010 (27 September 2024) [2024] ZAGPPHC 1010

COURT

North Gauteng High Court, Pretoria

BEFORE

Snyman

CASE / FILE NUMBER

63387/2020

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IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE Number: 63387 / 2020

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

27 September 2024

In the matter between:-

HOFMANN PRINSLOO

First Applicant

PIETER DU PLESSIS

Second Applicant

DR CORNELIUS PAPENFUS

Third Applicant

DIRK CONRADIE

Fourth Applicant

MASHUPYE MATLALA

Fifth Applicant

and

DEVELOPMENT BANK OF SOUTHERN AFRICA LTD Respondent

In Re:

DEVELOPMENT BANK OF SOUTHERN AFRICA LTD Applicant

HOFMANN PRINSLOO

First Respondent

PIETER DU PLESSIS

Second Respondent

DR CORNELIUS PAPENFUS

Third Respondent

DIRK CONRADIE

Fourth Respondent

MASHUPYE MATLALA

Fifth Respondent

JUDGMENT:

LEAVE TO APPEAL

SNYMAN, AJ

Introduction

[1] This judgment concerns an application for leave to appeal brought by the applicants on 15 August

2024. The applicants were the respondents in the main application. In terms of a judgment handed down on 24 July 2024 in the main application, I found against the applicants, and gave judgment in favour of the respondent (the applicant in the main application), making the arbitration award in its favour an Order of Court, and dismissing the applicants' counter application.

[2] The application for leave to appeal was argued virtually on 23 September 2024, and I indicated at the conclusion of the hearing that judgment was reserved and that judgment in the leave to appeal application would be handed down on 3 September 2024. I now hand down judgment accordingly.

Leave to Appeal

[3] Leave to appeal is not there for the asking.[1] This is evident from section 17(1)(a) of the Superior Courts Act[2], which provides that:

‘(a) Leave to appeal may only be given where the judge or judges concerned are of the opinion that:

(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 a matter under consideration.’

[4] As to the meaning of ‘reasonable prospects of success’, the Court in *Member of the Executive Council for Health, Eastern Cape v Mkhitha and Another*[3] said the following:

‘Once again it is necessary to say that leave to appeal, especially to this Court, must not be granted unless there truly is a reasonable prospect of success. Section 17(1)(a) of the Superior Courts Act 10 of 2013 makes it clear that leave to appeal may only be given where the judge concerned is of the opinion that the appeal would have a reasonable prospect of success; or there is some other compelling reason why it should be heard.

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.’

[5] Next, and as to what would constitute a compelling reason for another Court to entertain the appeal, the Court in *Caratco (Pty) Ltd v Independent Advisory (Pty) Ltd*[4] had the following to say:

‘... A compelling reason includes an important question of law or a discrete issue of public importance that will have an effect on future disputes. But here too, the merits remain vitally important and are often decisive ’

Analysis

[6] It must be membered, as a point of departure, that the respondent had brought the application to make the arbitration award handed down by retired Judge C Pretorius on 12 April 2023 (the award), an order of Court, and save for the applicants’ counter application, there was no other basis to oppose such relief sought. In other words, the arbitration award itself always stood as unchallenged, and enforceable. Although the applicants in their

counter application had asked for primary relief of the dismissal of the application to make the award an order of Court, that relief sought was not pursued when

the matter was heard. Instead, the applicants focussed on the enforcement of the award being stayed until the new litigation brought by the applicants in the High Court by way of a summons issued under case number 096171/23 (the new case), had been concluded.

- [7] It is unclear from the applicants' application for leave to appeal whether they focus on reasonable prospects of success on appeal, or whether they rely on special circumstances (section 17(1)(a)(ii)). That being said, it can however readily be stated from the outset that no special circumstances exist in this case that would justify the granting of leave to appeal as contemplated by section 17(1)(a)(ii), as there is simply no important question of law or a discrete issue of public importance that will have an effect on future disputes, in existence in casu, nor has such a case been properly made out by the applicants. The legal principles at stake in this case are settled and trite, and the matter raises no issue of public importance that could affect future disputes of this kind. In my view, section 17(1)(a)(ii) finds no application in this instance.
- [8] This leaves the issue of reasonable prospects of success. Much of the grounds raised by the applicants in seeking leave to appeal on this basis are little more than rehashing that which has already been argued when the matter originally came before me. In particular, the applicants seek to make out in essence the very same arguments relating to the principles of res judicata, issue estoppel, the once and for all rule, and the doctrine of election, which I have already addressed in full in my judgment, and decided based on the application of trite legal principle to what was in essence undisputed facts. The applicants have simply made out no case that another Court would decide otherwise.
- [9] I believe that as a general proposition, the applicants' application for leave to appeal, save for the two specific issues dealt with in this judgment below, simply does not make out a case for leave to appeal. All considered, it is my view that the applicants suggest that I have erred, simply because the applicants disagree with the conclusions that I came to, especially concerning certain factual findings I had made and where I applied legal principles to those facts. This mere disagreement cannot make out a case for leave to appeal. Overall, the applicants persist in arguing more or less the same case they argued when this matter was originally argued before me, and just as was the case then, I remain convinced that these arguments have no substance. In general, the applicants have no reasonable prospects of success on appeal on any of the grounds for seeking leave to appeal are concerned, where it comes to these findings I had made.
- [10] It would seem the real gravamen of the applicants' complaint upon which their seeking of leave to appeal is based, is that my judgment in essence decided the applicants' case brought in terms of the new case, when that case was not before me. Aligned to this ground is then the further ground that I failed to exercise my discretion properly and judicially when dismissing the counter application, instead of granting the stay sought. For the reasons to

follow, I remain unconvinced that there is any substance in these grounds for seeking leave to appeal, and there are simply prospects of success on appeal in this respect.

- [11] What the respondent was seeking in the main application was the enforcement and then execution of an unchallenged arbitration award in its favour. It follows that what the applicants were then seeking in their counter application was tantamount to a stay of execution / enforcement, pending the determination of their new case. In deciding whether to accede to such a request, this Court would be asked to exercise a discretion.[5] An evaluation of the prospects of success in the new case would be part of exercising the discretion.[6] Another factor to be considered would be whether real and substantial justice requires the stay, or in other words, an injustice would be done if the stay is not granted.[7] A further consideration is the potentiality of irreparable harm being sustained if a stay is not granted. It should also not be ignored that the party seeking enforcement would be entitled to payment as the award itself is simply not in dispute,[8] because ordinarily only where the award itself is disputed, a stay may well be appropriate.[9] As succinctly said in *Van Rensburg and Another NNO v Naidoo and Others NNO; Naidoo and Others NNO v Van Rensburg NO and Others*: [10]

‘... a court has inherent jurisdiction, in appropriate circumstances, to order a stay of execution or to suspend an order. It might, for example, stay a sale in execution or suspend an ejectment order. Such discretion must be exercised judicially. As a general rule, a court will only do so where injustice will otherwise ensue.

A court will grant a stay of execution in terms of Uniform Rule 45A where the underlying causa or judgment debt is being disputed, or no longer exists, or when an attempt is made to use the levying of execution for ulterior purposes. As a general rule, courts acting in terms of this rule will suspend the execution of an order where real and substantial injustice compels such action’.

- [12] Also pertinent is the following dictum in *Belmont House (Pty) Ltd v Gore and Another NNO* [11]:

‘It rather seems to me that, what Belmont seeks to invoke, is the power of the High Court to prevent the abuse of its process by staying proceedings in certain circumstances. The nature of this power, and the circumstances in which it will be exercised, is succinctly described as follows in *Herbstein & Van Winsen The Civil Practice of the High Courts of South Africa* supra at 306: ‘(T)he power to do so will be exercised sparingly and only in exceptional cases. This should be done with very great caution and only in clear cases. Proceedings will be stayed when they are vexatious or frivolous or when their continuance, on all the circumstances of the case, is, or may prove to be, an injustice or serious embarrassment to one or other of the parties ’

It should, however, be borne in mind that, although a stay of proceedings can be ordered when same are vexatious or an abuse of the process of the court, it cannot be granted in the exercise of an inherent discretion merely to avoid injustice and inequity ...’

- [13] As stated above, and in the affidavits supporting their counter application, the applicants themselves raise very much the same facts and issues as contained in the new case, and rely on these contentions to substantiate a stay. Because these facts and issues then form the very basis of seeking a stay of the enforcement of the award, it is difficult to understand how the applicants can be critical of the fact that it was considered, and then decided. The simple reality is that all of this needed to be considered and decided, so as to ascertain whether it was sufficiently compelling for me to exercise by discretion to stay the enforcement of the award in the light of the pending new case. It is only in this context that I pronounced on any aspect relating to the merits of the new case, and even then, only to the extent as it was raised in the counter application itself, which was before me to decide. I did not decide the case as set out in the summons containing the applicants' new case, even though it was handed to me. It was only handed to me to substantiate to me that it existed, and I never considered or decided anything contained therein. I dismissed the stay application, because in my view there was simply no merit in the case, as was set out in the applicants' affidavits in the counter application that was before me to decide. This was an issue I was compelled to consider when exercising my discretion whether to grant the stay. I can see no reasonable prospect that another Court would come to a different conclusion in this regard.
- [14] Insofar as the applicant suggest that the mere existence of the new case is just cause for granting a stay, this suggestion is lacking in substance. As correctly submitted by the respondent, a stay should only be granted if it would serve a proper purpose, and that would always necessitate an investigation as to the basis and reasons for the stay. If that is not the case, then all any party facing execution of an adverse arbitration award would need to do is to simply issue a summons to defeat the execution, which cannot be a sustainable proposition.
- [15] The aforesaid ground for seeking leave to appeal, as raised by the applicants, has many comparisons to the judgment of the Full Bench of this Court in *IDS Industry Service and Plant Construction South Africa (Pty) Ltd v Industrious D.O.O*[12], where the Court, on appeal, was called on consider whether the Court a quo erred in refusing to grant a stay of execution of an arbitration award, pending new litigation. In particular, and in a manner quite comparable to the case in *casu*, the appellant in that case contended that it had a counterclaim for enrichment it wanted to introduce during the arbitration, but did not, and this formed inter alia the basis of the new claim (litigation), which the appellant contended had good prospects of success at trial. It was also said

that if the stay was refused, it would be required to pursue its claims whilst having no way of preventing execution of the judgment.[13] The Court a quo nonetheless refused to grant the stay sought, finding, inter alia, that the appellant's action was *res judicata* and had no prospects, and that if the appellant was aggrieved by the award, it ought to have taken steps to challenge it but this was not done.[14] In *casu*, I dealt with the applicants' case in a very similar manner.

[16] The Court in IDS Industry supra accepted that the Court a quo had a discretion to stay the execution,[15] and in exercising this discretion, a consideration of the prospects of success showed that the claims the appellant was now raising

lacked such prospects. The Court held that on this basis, the Court a quo properly exercised its discretion in refusing to grant the stay.[16] But further, and importantly, in a manner similar to what I found in my judgment, the Court had the following to say:[17]

‘In any event, even if there were some merit in the alternative claims, the action is barred from proceeding by the arbitration agreement. This is because the parties agreed that the unjustified enrichment issues could be dealt with in the arbitration proceedings ’

The Court concluded:[18]

‘The dismissal of the counter application is unassailable. The pending action has no real prospects of success and is barred by the arbitration agreement. In the exercise of the court's discretion to stay, the court a quo held that South African courts should exhibit a 'pro-enforcement bias' with regard to the enforcement of foreign arbitral awards. I agree. The 'pro-enforcement bias' is a strong factor in the exercise of a court's discretion and should weigh in favour of enforcement of arbitral awards and against delaying it. However, accepting this, the counter application does not meet the threshold for a stay, namely the avoidance of real and substantial injustice.’

[17] The applicants in casu argued that because of my judgment, they would be precluded from presenting their case in the new case, as the issues raised therein

have already been decided. This however cannot be correct. I did not finally decide any of these issues. I decided these issues as part of considering prospects of success in the context of exercising a discretion to stay execution, which is a cause of action and relief sought distinct and separate from the new case on the merits, meaning that res judicata cannot apply.[19] The applicants remain free to pursue their claim(s) in the new case, of course subject to any defences the respondent may wish to raise,[20] and should they perhaps one day succeed, they can recover their claim(s) from the respondent. This reality runs counter to a legitimate case of the existence of real and substantial prejudice sufficient to support the granting of a stay. The following dictum in IDS Industries supra, in this regard, is pertinent:[21]

‘The disadvantage to IDS of having to enforce its claim against Industrious if, one day, it actually pursues and finally succeeds in that claim does not constitute 'real and substantial injustice'. If that were so, a stay of enforcement could always be obtained by the simple device of instituting a claim against the enforcer.’

[18] The applicants finally argue that if the award is executed, and considering it is for a considerable sum of money, they may well be sequestered, which would manifestly compromise their ability to pursue their new claim. This is unfortunately for them not a proper basis on which to grant a stay, as it would be a stay based on considerations of equity, which, as I have dealt with above, is not permissible.

Conclusion

[19] All the above considered, I thus conclude that the applicants have failed to show that there exists a reasonable prospect that another Court would come to a different conclusion, and in my view the applicants have negligible prospect of success on appeal. The application for leave to appeal falls to be dismissed.

[20] This only leaves the issue of costs. The applicants' application for leave to appeal failed. As such, the respondent is entitled to its costs. The respondent asked for punitive costs. I am however not inclined to grant such an order, as I do not believe the applicants' application for leave to appeal, although open to some legitimate criticism as advanced by the respondent, would fall within the parameters of what may be considered hopeless or frivolous to justify such an order. What is justified is a costs award against the applicants, including the costs of two counsel, at scale C.

[21] In all the circumstances as set out above, the following order is made:

Order

1. The applicants' (respondents in the main application) application for leave to appeal is dismissed.
2. The applicants are ordered to pay the respondent's (applicant in the main application) costs on a party and party scale C, the one paying the other to be absolved, which costs shall include the costs of two counsel.

SNYMAN AJ

Acting Judge of the High Court of South Africa

Gauteng Division, Pretoria

Appearances:

Heard on: 23 September 2024 For the Applicants: Advocate M P Van der Merwe SC Instructed by: Couzyn Hertzog & Horak Attorneys For the Respondent: Advocate J Vorster SC together with Advocate B Ramela Instructed by: Norton Rose Fulbright (SA) Attorneys Date of Judgment: 27 September 2024

[1] See *J & L Lining (Pty) Ltd v National Union of Metalworkers of SA and Others*

(2) (2019) 40 ILJ 1303 (LC) at para 5.

[2] Act 10 of 2013.

[3]

[2016] JOL 36940 (SCA) at paras 16 – 17. See also *Ramakatsa and Others v African National Congress and another*

[2021] JOL 49993 (SCA) at para 10, where it was held: ‘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 ...’.

[4] 2020 (5) SA 35 (SCA) at para 2. See also *Qoboshiyane NO and Others v Avusa Publishing Eastern Cape (Pty) Ltd and Others* 2013

(3) SA 315 (SCA) at para 5; *Minister of Justice and Constitutional Development and Others v Southern Africa Litigation Centre and Others* 2016 (3) SA 317 (SCA) at para 23; *Tshwane City and Others v Nambiti Technologies (Pty) Ltd* 2016 (2) SA 494 (SCA) at para 6.

[5] See *Whitfield v Van Aarde* 1993 (1) SA 332 (E) at 337E-H.

[6] *BP Southern Africa (Pty) Ltd v Mega Burst Oils and Fuels (Pty) Ltd and Another and a Similar Matter* 2022 (1) SA 162 (GJ) at paras 26 – 27.

[7] *Stoffberg NO and Another v Capital Harvest (Pty) Ltd* 2021 JDR 1644 (WCC) at para 26.

[8] In *BP Southern Africa* (supra) at para 25, it was said: ‘...A litigant with an enforceable judgment is entitled to payment, and only in rare cases

would be delayed in that process ...’.

[9] *Firm Mortgage Solutions (Pty) Ltd and Another v Absa Bank Ltd and Another* 2014 (1) SA 168 (WCC) at para 6. See also *Janse van Rensburg v Obiang and Another* 2023 (3) SA 591 (WCC) at para 44, where it was held: ‘Even where the causa of a claim is undisputed, a court may still grant a stay where otherwise an injustice will be done. This will be the case, in my view, where the possibility exists that the order on which the execution is predicated may be expunged ...’.

[10] 2011

(4) SA 149 (SCA) at paras 51 – 52.

[11] 2011 (6) SA 173 (WCC) at paras 17 – 18.

[12] 2023 JDR 2094 (GJ).

[13] See para 9 of the judgment.

[14] Id at para 10.

[15] Id at para 13.

[16] Id at para 20.

[17] Id at para 21.

[18] Id at para 25.

[19] See National Sorghum Breweries Ltd (t/a Vivo African Breweries) v International Liquor Distributors (Pty) Ltd

[2000] ZASCA 159; 2001 (2) SA 232 (SCA) at para 2; Yellow Star Properties v MEC Department of Development Planning and Local Government 2009 (3) SA 577 (SCA) at paras 21 – 22.

[20] The respondent submitted in argument that they have raised res judicata as a defense to the applicants' new claim, not because of my judgment, but because of the content of and findings made in the undisputed arbitration award.

[21] Id at para 26.

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Prepared on 9 October 2026 · Esheria