IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MTHATHA)

Case no: 5345/2022

In the matter between:

DR MARCUS BONGANI BARA **First Applicant**

KOSTANTINOS APOSTOLOU **Second Applicant**

And

NEDBANK LIMITED **Respondent**

JUDGMENT ON APPLICATION FOR LEAVE TO APPEAL

KUNJU AJ :

A. Introduction:

[1] This is application for leave to appeal an order and a Judgment handed down on 26 March 2024.

[2] What I decided in the judgment was a question of costs. In other words, I was called upon to decide who between the applicants and the respondent was entitled to costs of the application.

[3] I found that each party was liable for its own costs. It is that finding that is the subject of this application for leave to appeal. Looked at it on another angle, this is an attempt to upset the said finding. Ineluctably, the appealability of such an order forms an integral part of the present application. Invariably, the provisions of section 17 of Act no. 10 of 2013 will be considered. So is the nature of the discretion exercised.

[4] In this judgment I deal with this matter under the following headings:

[4.1] the issue in the main application;
[4.2] the applicants' compliance with the provisions of rule 35(4) of the uniform rules of court;
[4.3] the legal requirements for an appeal against a cost order and the legal test on leave to appeal;
[4.4] the notice of application for leave to appeal and the grounds of appeal; and
[4.5] conclusion.

[5] It is to these headings stated above that I now turn.

B. <u>The issue in the main application</u>

[6] It was common cause between the parties that they needed a decision on costs. The reason for that position was that the respondent had provided the documents required to the applicants and in doing so it did not concede that the applicants had made out a case in terms of the rule 35(14). As a consequence, what remained unresolved was the issue of costs. It is that aspect I was called upon to decide.

[7] In other words, the main issue between the parties was settled but outstanding was the determination of who between the parties was liable for costs.

[8] For proper allocation of costs in such circumstances, I was bound to assess the merits or demerits of the application. I stated in paragraph 13 of my judgment the following :

"Of course, in this situation the appropriate approach is to have regard to the merits of the matter and if the applicant would have succeeded the costs of the application would ordinarily be granted in his favor. If not, applying rule of costs, the respondent would be entitled to costs. The Court makes the proper allocation of costs with the material at its disposal."

[9] If the applicants had made out a case in terms of rule 35(14) provisions, potentially they could have gotten an order of costs in their favour. They achieved minimal success. The majority of documents which were demanded by the applicants were successfully resisted by the respondents.

[10] The above was not the only issue that persuaded me to issue the order I did. In paragraphs 37-38 of the judgment I stated the following:

"37. On costs, I have taken into account the nature of the proceedings and the effect a costs order will have on either of the parties and the prevailing circumstances.

38. I must mention that is it difficult to understand why a founding affidavit consisted of 15 paragraphs and on the other hand have a replying affidavit with up to 30 paragraphs (Bara matter) and 24 paragraphs in the Apostolou matter".

C. <u>Applicants' compliance with the provisions of rule 35 (14)</u>

[11] In respect of the reconciliation document demanded under rule 35(14) I found in favour of the applicants. Equally, the dishonored or honored payments set-out in paragraph 11 of the judgment were found necessary to be furnished to the applicant. In this respect, I stated that one can reasonably believe that the reconciliation statement would exhibit these documents. In respect of

dishonored payments I issued the order in favour of the applicant and *ex abundanti cautela*. That I did not consider it to be a success in favour of the applicant.

[12] The relevant jurisdictional requirements under rule 35(14) which the applicants were expected to articulate and address are:

12.1 a clearly specified document for purposes of pleading; and

12.2 be relevant to a reasonably anticipated issue in the action.

[13] Nowhere in the founding affidavits do the applicants indicate how and why are:

13.1 the required documents necessary for pleadings; and

13.2 are relevant to a reasonably anticipated issue in the action.

[14] It is why in paragraph 25 of the judgment and in context of items (d) to (g) I found as follows:

> "it is not stated in the founding affidavit why are these documents relevant for pleading purposes and why are likely to form an issue in the action, it is equally not discernible from the pleading why they should be necessary or relevant."

[15] In short, the applicants' application did not meet the requirements set out under rule 35(14) and it is why it failed in those instances where such allegations were strictly necessary or it was difficult and impossible for me to infer from the founding affidavit that indeed the documents concerned would have been discoverable under the provisions of rule 35(14).

D. <u>The Legal requirements for an appeal on costs and on leave to appeal</u>

[16] The general principle on costs is enunciated in **Ferreira vs Levin N.O and others; Vryenhoek and others v Powell NO and others 1996 (2) SA 621 CC para 3** as follows:

> "The Supreme Court has, over the years, developed a flexible approach to costs which proceeds from two basic principles, the first being that the award of costs, unless expressly otherwise enacted, is in the discretion of the presiding judicial officer, and the second that the successful party should, as a general rule, have his or her costs. Even this second principle is subject to the first. **The second principle is subject to a large number of exceptions where the successful party is deprived of his or her costs**. Without attempting either comprehensiveness or complete analytical accuracy, depriving successful parties of their costs can depend on circumstances such as, for example, the conduct of parties, the conduct of their legal representatives, whether a party achieves technical success only, the nature of the litigants and the nature of the proceeding. I mention these examples to indicate that the principles which have been developed in relation to the award of costs are by their nature sufficiently flexible and adaptable to meet new needs which may arise in regard to litigation…" (my underlining)

[17] A Court of appeal will generally be very loath to interfere with an order as to the award of costs. In **Hotz and others vs University of Cape Town 2018 (1) SA 369 CC in paragraphs 25 and 28**, the Constitutional Court said:

> "[25] In **Trencon Construction (Pty) Ltd vs Industrial Development Corporation of South Africa [2015] ZACC 22;2015 (5) SA 245 (CC);2015 (10) BCLR 1199 (CC)** this court dealt with the power of an appellate court to interfere with the High Court's order. It held that the proper approach on appeal is for an appellate court to ascertain whether the discretion exercised by the lower court was discretion in the true sense or whether it was a discretion to loose sense. The distinction in either type of discretion, the Court held, "will create the standard of the interference that an appellate court must apply". **This Court remarked, per Khampepe J, that "[a] discretion in the true sense is found where the lower court has a wide range of equally permissible options available to it". In such instances, the ordinary approach on appeal is that the "the appellate court will not consider whether the decision**

reached by the court at first instance was correct, but will only interfere in limited circumstances; for example, it is shown that the discretion has not been exercised judicially…". This type of discretion has been found by this Court in many instances, including matters of costs…". The question remains whether the High Court, in considering the relevant circumstances and available options**, judicially exercised its discretion in mulcting the applicants with costs.**

…

[28] It is established that a court of first instance has discretion to determine the costs to be awarded in light of the particular circumstances of the case. Indeed, where the discretion is one in the true sense, contemplating that a court chooses from a range of options, a court of appeal will require a good reason to interfere with the exercise of that discretion. A cautious approach is, therefore required. A Court of appeal may have a different view on whether the costs award was just and equitable. However, it should be careful not to substitute its own view for that of the High Court because it may, in certain circumstances be inappropriate to interfere with the High Court's exercise of discretion".

[18] In **R vs Zackey 1945 AD 505** with reference to **Fripp vs Gibbon & Co 1913 AD 354 at 363**, the Court said:

"Questions of costs are always important and sometimes difficult and complex to determine, **and in leaving the magistrate a discretion the law contemplates that he should take into considerations the circumstances of each case, carefully weighing the various issues in the case**, the conduct of the parties and any other circumstances which may have a bearing upon the question of costs, and then make such order as to costs as would be fair and just between the parties. **And if he does not act capriciously or upon any wrong principle, I know of no right on the part of a Court of appeal to interfere with the honest exercise of his discretion". (my underlining).**

[19] A Court of appeal will be bound to first consider if there are grounds to interfere with the exercise of my discretion as set out in my judgment. It is only after that finding is made that the judgment could be altered. The grounds for interfering with the discretion I exercised are usually only where it was not

exercised judicially, or where the decision was influenced by wrong principles, or where the decision was affected by a misdirection on the facts, or where the decision could not reasonably have been reached by a court properly directing itself to the relevant facts and principles.

[20] **Tebeila Institute of Leadership, Education, Governance and Training vs Limpompo college of Nursing and Another 2015 (4) BCLR 396 (CC)** tells us in paragraphs 13 and 14 thus :

> "13. Few appellate Courts countenance appeals on costs alone, and indeed the statute regulating appeals from a High Court to a Full Court or the Supreme Court of Appeal has long provided that an appeal may be dismissed on the sole ground that the decision sought 'will have no practical effect or result" and that, **save under exceptional circumstances**, the question whether there would be any practical effect or result must be determined "without reference to any consideration of costs". **The practical impact of this provision is that appeals on costs alone are allowed very rarely indeed.**
>
> 14. All this makes this Court reluctant to correct the mistake here. And we have given careful consideration to the alternative. This is to dismiss the application and send the applicant back to the High Court, in order to seek its leave to appeal against the costs order to the Full Court. **But, as shown above, that course may fail on the very point that appeals against costs orders alone are not countenanced".**

[21] As set out in the above judgments, section 16(2)(a) of the Superior Courts Act, 10 of 2013(the Act), contemplates that exceptional circumstances must be established for the application to succeed in an application for leave to appeal on costs. Very substantial costs could constitute exceptional circumstances. That is not the case here.

[22] The main application being an interlocutory opposed matter, it can never be characterized as exceptional on the basis of costs incurred. That is not what is contemplated under the requirement. Otherwise, all simply and straightforward matters that are heard in the opposed court will be regarded as such. Put otherwise, all costs orders granted in motion under rule 35 (14) proceedings will be regarded as appealable.

[23] In **Barense and Another vs [2023] 3 ALL SA 381(WCC) para11** said:

> "What are exceptional circumstances? In S vs Petersen it was held as follows:
>
> > "Generally speaking "exceptional" is indicative of something unusual, extraordinary, remarkable, peculiar or simply different. There are, of course, varying degrees of exceptionality, unusualness, extraordinariness, remarkableness, peculiarity or difference."

[24] There is thus nothing exceptional about this matter. In arguing that there are no exceptional circumstances in this matter, during oral submissions Mr Botma referred the Court to a case of **SeaTrans Maritime v. Owners, MV Ais Mamas & another 2002 (6) SA 150 (C).** He further argued that an appeal on costs will have no practical effect. He referred the Court to **Oudebaaskraal (Edms) Bpk en Andere v Jansen van Vuuren en. Andere 2001 (2) SA 806 (SCA)**. He made reference to **Mgwenya NO. v Kruger 2017 JDR 1488 (SCA)** as well.

[25] The notice of application for leave to appeal does not state the exact ground under section17 of the Act on which this application is based. It is safe to assume that it is the following:

> "17(1) Leave to appeal may only be given <u>where the Judge</u> or Judges concerned <u>are of the opinion that: (a)</u> (i) the appeal would have a reasonable prospects of success" (my underlining).

[26] It is apposite to refer to what was said in **MEC for Health, Eastern Cape vs Mkhitha and Another [2026] ZASCA 176. At paragraphs16-17 :** there the Court said:

"[16] 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.**

[17] 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.**

[27] In **Zuma vs Office of the Public Protector and others (2020) ZASCA 138 in paragraph 19** the Court said:

"[19] Since there is no appeal against the order dismissing the review, the only question is whether the appeal against the costs order has a reasonable prospect of success. In this regard Mr Zuma faces a formidable hurdle: **in granting a costs order, a lower court exercises a true discretion. An appellate court will not interfere with the exercise of that discretion, unless there was a material misdirection by the lower court".**

[28] In the case of **Commissioner for the South African Revenue Service v Nyhonyha and Others (1150/2021) 2023 (6) SA 145 (SCA) (18 May 2023**) :

"[17] It is trite that the scope for interference on appeal with the exercise of a true discretion is limited. The question is not whether the appeal court would have reached the same conclusion, but whether the discretion was exercised properly. For present purposes it suffices to say that interference would be called for if the exercise of the discretion was

based on a misdirection of fact or a wrong principle of law. See Ex parte Neethling and Others 1951 (4) SA 331 AD at 335E and Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd and Another 2015 (5) SA 245 (CC) (Trencon) para 88.

[18] ***A true discretion is one which provides a court with a range of permissible options. Well-known examples are costs orders and awards of damages.*** *See Media Workers Association of South Africa and Others v Press Corporation of South Africa Ltd 1992 (4) SA 791 (A) (Perskor) at 800E and Trencon paras 84-85. This was articulated as follows in Florence v Government of the Republic of South Africa 2014 (6) SA 456 (CC) para 113:*

> ***'Where a court is granted wide decision-making powers with a number of options or variables, an appellate court may not interfere unless it is clear that the choice the court has preferred is at odds with the law. If the impugned decision lies within a range of permissible decisions, an appeal court may not interfere only because it favours a different option within the range.'***

[19] It is clear that the expression 'wide decision-making powers' in this passage refers to the multitude of permissible options that characterise a true discretion. This must not be confused with a wide or loose discretion which means 'no more than that the Court is entitled to have regard to a number of disparate and incommensurable features in coming to a decision'. See Knox D'Arcy Ltd and Others v Jamieson and Others 1996 (4) SA 348 AD at 361I, quoted with approval in Trencon para 86.

[29] In **Fusion properties 233 CC vs Stellenbosch Municipality [2021] ZASCA 10-in paragraph 18** the Court said:

> "[18] Since the coming into operation of the Superior Courts Act, there have been a number of decisions of our courts which dealt with the requirements that an applicant for leave to appeal in terms of ss 17(1)(a)

(i) and 17(1)(a)(ii) must satisfy in order for leave to be granted. The applicable principles have over time crystallised and are now well established. Section 17(1) provides, in material part, that leave to appeal may only be granted '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. . ..' It is manifest from the text of s 17(1)(a) that an applicant seeking leave to appeal must demonstrate that the envisaged appeal would either have a reasonable prospect of success, or, alternatively, that 'there is some compelling reason why an appeal should be heard'. **Accordingly, if neither of these discrete requirements is met, there would be no basis to grant leave."**

[30] **Nwafor vs The Minister of Home Affairs and others (2021) ZASCA58 in paragraph 25**- the Court had this to say:

"[25] Section 17(1) of the Act sets out the statutory matrix as well as the test governing applications for leave to appeal. The section states in relevant parts, and in peremptory language, that 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; (ii) there is some other compelling reason why the appeal should be heard including, conflicting judgments on the matter under consideration; . . . (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.'

[31] It is thus important for any litigant prior to bringing an application for leave to appeal to closely consider the above legal principles. An application as this will be avoided – no doubt.

E. The notice of application for leave to appeal and the grounds of appeal

[32] The notice of appeal has a strange features in that it is signed by an advocate. It purports in certain instances to be directed against the reasons for the order as opposed to the substantive order granted (see: **Elan Boulevard (Pty) Ltd vs Fnyn Investments (Pty) Ltd 2019(3) SA 441 SCA at 448A**) and **ABSA Bank v Mkhize 2014 (5) SA 16 para 64)**. That approach is not apt.

[33] Although I dealt with two matters in one judgment the notice of appeal has made it difficult and impossible for me to know if the grounds of appeal raised apply to either Bara or Apostolou matter. For that reason, the application is not a model of clarity.

[34] Notwithstanding the above I deal with each ground set-out in the notice of appeal below:

Ground no 1

(The learned judge erred in finding that the requested documents were provided to the applicants after receipt of the Rule 35 (14) Notice because they were actually provided post timeously and after the respective applications were launched and set down. In amplification, the requested documents were furnished on the eve of the hearing i.e post – timeous compliance to an application to compel).

[34.1] this ground complains that I said the documents were provided after receipt of rule35(14) notice.

[34.2] my consideration of the application was less about when were the documents received. I concentrated more on whether the application passed muster or not. That I did by taking into account the requirements that are necessary for the application to succeed against what was alleged or contained in the court papers. There was no dispute about the stage of receipt of the documents between the parties.

[34.3] Above all, the parties had agreed that the substantive order was no longer necessary given that the documents were handed over to the applicant already.

[34.4] My focal point therefore in the main application was not when the applicants were given the documents but rather whether rule 35(14) was properly invoked or not. In any event, I should say the notice was filed timeously. As a fact, the required documents were received after rule 35 (14) notice was issued.

[34.5] In these circumstances the first ground is destitute of merit and stands to fail.

Ground no 2

(The learned judge erred in finding that the applicants were in possession of the reconciliation account. There is no basis for this factual finding. In fact, the applicants were not in possession of the reconciliation account and it was not attached to the summons hence the applicants sought them in terms of Rule 35 (14). Furthermore, a balance of statement and a reconciliation account are different things which must necessarily be distinguished).

[34.6] The above ground suggests that the applicant is not in possession of the reconciliation account. I was told from the bar, that the issue that was outstanding related to costs and all other issues were settled between the parties.

[34.7] For that matter, it is irrelevant whether the applicant was in possession of this account or not because in relation to this part of demand, I found in favour of the applicant. In paragraphs 18-20 of my judgment I explained why I believed the applicant was entitled to the reconciliation account. It is not clear why the applicants seek to challenge this area of the judgment. This finding is favourable to the applicants, hence I do not understand the challenge. As to why one would appeal a point favourable to him, is indeed difficult to comprehend. It actually is impermissible in law.

Ground no 3

(The learned judge erred in finding that there was no need for the respondent to furnish the applicant with the S129 Notice. In amplification, S129 (1)(b) of the National Credit Act 34 of 2005 requires a credit provider to provide a defaulter with notice prior to instituting any legal proceedings. In further amplification, the respondent specifically pleads (in its answer) that the S129 Notice is the only document that the applicants are entitled to).

[34.8] The applicant does not appreciate the finding I made in this regard. The finding is made in the context of rule 35(14). After a careful consideration of the provisions of the rule, I found that for purposes of pleading, it was not strictly necessary for the applicant to get such document before he could plead. I also found that the applicants could have denied receipt of the documents in its plea – if that was the position. There is equally no merit on this ground.

[34.9] My consideration of the requirements for the application was based on the applicable rule not on what the respondents had said to the applicant. More so that the documents were given to the applicant already and the issue that remained for a decision was that of costs.

Ground no 4

(The learned judge erred in finding that the applicants' case is not made out in the founding affidavit, proceeding on the erroneous premise that the applicants were in possession of the requested documents as attached to the summons. In amplification, material facts to sustain the cause of action are pleaded in the founding affidavit in no uncertain terms).

[34.10] The criticism under this heading is incorrect. What was attached to the summons had nothing to do with what was alleged or not in the founding affidavit. Indeed, the founding affidavit does not address the jurisdictional requirements set-out under rule 35(14).

Ground no 5

(The learned judge erred in finding that the applicant acted opportunistically in seeking production of documents that were attached to the summons. There was no factual basis for the adverse finding made by the learned judge. In amplification, the reconciliation account was not attached to the summons and this supported by the respondents own version as pleaded in answer. All that is attached is a balance of statement which must necessarily be distinguished from a reconciliation account (emphasis).

[34.11] It is difficult if not impossible to know whether the attack made herein relates to the Bara matter or Apostolou matter. This is the thread running through this application for leave to appeal. It leaves the court unable to know the exact judgment to which the attack is directed.

[34.12] Under this ground of appeal I suspect that reference is made to paragraphs 16 and 25 – 28 of my judgment, where I dealt with the Bara judgment. There I mentioned the documents which I found attached to the summons. I made a finding that sections 129 notice and a copy of the sale agreement were attached to the summons. A request for "**ancillary documents**", I found such demand non-compliant with rule 35(14). I also found a demand for correspondence sought as unnecessary because, the applicant characterized such correspondence **as correspondence that was exchanged between the parties.** My finding was that the applicant was in possession of such information. I also found that not enough was pleaded to enable the court to gauge whether the demand meets the requirements under rule 35(14). Absent necessary allegations and motivation, the application lacked merit. I do not understand what motivated the applicants to seek documents or correspondence that was in their possession.

[34.13] For the reasons set-out in my judgment, I found that a proper case was not made out for the production of items (d) to (g) of rule 35(14)

notice. Applicants would have succeeded in respect of demands (a) to (c). apart from anything else, that was not a significant success. The tiny success did not entitle the applicants to a cost order.

Grounds no 6 and 7

(The learned judge did not exercise his discretion judicially in the adjudication of the issue of costs and in impugning fault against the applicant premised on the criticism of the length of the applicants replying affidavit failing to take into account the following: the seventeen paragraph long and verbose background narrated by the respondent, issues of law raised in the answering affidavit and the various factual allegations that require proper reply, which could not have been left to chance. In amplification, there is no factual basis to sustain an adverse finding of opportunism against the applicants who merely ensured that they reply thoroughly.

(The learned judge erred in not ruling that costs should follow the result in favour of the applicant having erroneous regard to : (a) the finding that the applicant sought documents that were attached to the summons; (b) criticism levelled against the applicants replying affidavit, failing to take into account the factors mentioned in paragraph 6 above; and whereas the costs of these opposed applications are not insubstantial).

[34.14] In exercise of my discretion and as set out in paragraph 36 of my judgment, I took into consideration the following factors:

(a) the nature of the proceedings;
(b) the effect the costs order will have to both parties;
(c) the failure by the applicant to make out a case in respect of demands (d) to (g) as set out in rule 35(14) notice; and
(d) the unnecessarily copious replying affidavit.

[34.15] Both applications did not involve a large amount of work or costs. Both parties were represented by Junior Counsel. The hearing was completed inside two hours.

F. Conclusion :

[35] In my view, I applied my discretion properly and there is nothing exceptional that exists in this matter, neither is it in the interest of justice to grant a leave to appeal. Rule 35 proceedings occupy our motion Court rolls every week. I have no hesitation to characterise these applications (rule 35 **(**14**)**) as "run – of – the – mill cases".

[36] The costs of this application must be decided. For reasons stated above, I believe that scale "**A**" is appropriate. I see no reason why I should not direct the applicants to pay costs of this application. Litigants need to be reminded that they are required to pay for their legal costs. Their opponents are not there to finance their litigation. Party and party costs are designed to compensate a losing party for fees reasonably incurred. Not all fees are recoverable under that scale. It is for this reason that I remind the litigants of their obligation.

[37] For all the above reasons, an order in the following terms shall issue:

[37.1] The applications for leave to appeal under cases no 5345/2023 and 5858/2023 are hereby dismissed with costs on Scale "**A**"

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V. KUNJU
ACTING JUDGE OF THE HIGH COURT

For the Applicants : **Mr Ndabeni**
Instructed by : T. Ndabeni Incorporated Attorneys
No 28 Sprigg Street
Mthatha

For the Respondent : **Mr Botma**
Instructed by Straus Daly Incorporated

C/O K. B. Mabanga Incorporated
137 York Road
Meeg Bank Limited
Mthatha

Heard : **07 June 2024**
Delivered : **13 June 2024**