

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NUMBER: 2022/9206

DELETE WHICHEVER IS NOT APPLICABLE

1.REPORTABLE: NO

2.OF INTEREST TO OTHER JUDGES: NO

3.REVISED NO

12 August 2022


Judge Dippenaar

In the matter between:

THE BODY CORPORATE OF BARCELONA I

Applicant

And

ANELE DYANTYI

Respondent

LEAVE TO APPEAL JUDGMENT

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail. The date and time for hand-down is deemed to be 11h30 on the 12th of August 2022.

DIPPENAAR J:

[1] The applicant seeks leave to appeal against an order and judgment granted by me in the unopposed court on 8 June 2022 in terms of which I dismissed the application with costs. The applicant had sought an order authorising it to suspend the supply of electricity to the first respondent's unit until such time as he paid a certain amount to the application pertaining to electricity.

[2] My judgment is comprehensive and I stand by the reasons set out therein. Central to the judgment is the finding that the applicant did not on the application papers make out a proper factual or legal basis for the relief sought.

[3] I have considered the papers filed of record and the grounds set out in the application for leave to appeal as well as the applicant's arguments. I have further considered the submissions made in the applicant's heads of argument and the authorities referred to.

[4] In its application for leave to appeal, the applicant's central contention was that it has a reasonable prospect on appeal as envisaged by s 17(1)(a)(ii) of the Superior Court Act ("the Act").

[5] The applicant's case¹ in its founding affidavit was that it would be just and equitable to grant an order as: (i) the first respondent is consuming electricity on a daily basis (ii) which, because of his non- payment, has to be subsidised by the applicant. (iii) it is unfair to expect the applicant and therefor the other owners to pay for the electricity consumed by the property; (iv) the first respondent has not right to free electricity and the applicant in turn has no obligation to provide free electricity and (v) by allowing the applicant to

¹ At para 26 of the founding affidavit

terminate the supply of electricity pending payment of the amount referred to in the application, the applicant will at least be able to mitigate its damages.

[6] In its application for leave to appeal the applicant's central contention was that paragraphs 26.1 to 26.5 of the founding affidavit lay the basis for applicant's entitlement to the relief sought. In its application for leave to appeal it is stated:

"1.3 It is trite that a court may authorise an owner of immovable property (such as the owner of a sectional title unit) to terminate the supply of electricity to his/her unit in the event of a tenant defaulting on his/her/its payment obligations and/or in the event of unlawful occupiers of his/her/its unit who are consuming electricity without paying for such consumption.

1.4 A court may similarly authorise a body corporate to terminate the supply of electricity to a defaulting member of the said body corporate (i.e. a sectional title owner) in the event that the said member does not pay for the electricity consumption of his/her/its unit.

1.5 The basis of such application is the same as in the instance mentioned in paragraph 1.3 above,

[7] The applicant did not provide any authority in support of its submissions.

[8] The application was unopposed and I agree with the applicant that no costs order should have been granted. The costs order is however a *brutum fulmen* and has no practical effect as the respondents did not oppose the application and did not incur any costs in relation thereto. It is trite that leave to appeal is not lightly given in respect of what has become a dead issue² (here in relation to costs) and leave to appeal is not lightly given in respect of a costs order only. I am not persuaded that leave to appeal should be granted against the costs order only.

[9] It must be considered whether there is a sound and rational basis for the conclusion that there are prospects of success on appeal³, considering the higher

² Elida Gibbs (Pty) Ltd v Colgate Palmolive (Pty) Ltd 360 (W) at 367B

³ Four Wheel Drive Accessory Distributors CC v Rattan NO 2019 (3) SA 451 (SCA) at para 34

threshold test⁴ envisaged by s17 of the Superior Courts Act⁵. Given the paucity of legal authority advanced in support of the applicant's contentions and the absence of any express legal right relied on, I am not persuaded that the appeal would have a reasonable prospect of success as envisaged by s17(1)(a)(ii) of the Act and to grant leave to appeal on this basis.

[10] In the alternative the applicant contended that that there is a compelling reasons to grant leave to appeal as envisaged in s 17(1)(b) of the Superior Courts Act⁶ as other courts in this division have granted orders granting permission to body corporates to terminate the supply of electricity to defaulting sectional title owners, being the same substantive relief sought in the present application. Three orders were attached to the application for leave to appeal under three other case numbers in applications brought by other body corporates. In argument, this was the primary contention advanced by the applicant.

[11] No reference was made to these orders during argument of the unopposed application, nor were the application papers placed before the court at that time, so that the basis on which those orders were granted could be considered. In its heads of argument and in oral argument, the applicant, represented by its attorney of record, argued that the papers in the other three matters are substantially similar to the present, are based on the same grounds and were prepared by the same firm of attorneys.

[12] No application had been launched by the applicant to adduce additional evidence on appeal or for leave to place the application papers in the other three matters before the court. In those circumstances, I did not have regard to the application papers in those matters, which had simply been uploaded onto caselines.

⁴ Acting National Director Public Prosecutions and Others v Democratic Alliance [2016] ZAGPPH 489 (24 June 2016) at para 25

⁵ 10 of 2013

⁶ 10 of 2013

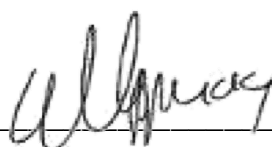
[13] I am however persuaded that it is in the interests of justice and the public interest to grant leave to appeal in order to obtain legal certainty in this Division, given the ostensibly conflicting orders that have been granted. I am satisfied that this constitutes a compelling reason as envisaged in s17(1)(a)(ii) of the Act.

[14] The applicant will have to take the necessary steps to place all the relevant papers pertaining to the other three matters before the appeal court in due course so that the appeal can be considered in light of all the relevant facts and with benefit of all the relevant papers. From what is before me I cannot conclude that the applications are based on the same legal basis, only that the relief sought is substantially similar.

[15] The applicant sought a referral to the Full Court of this Division, together with a costs order. As the application is and has been unopposed throughout I am not persuaded that the granting of any costs order would be appropriate.

[16] I grant the following order:

Leave to appeal is granted to the Full Court.



**EF DIPPENAAR
JUDGE OF THE HIGH COURT
JOHANNESBURG**

APPEARANCES

DATE OF HEARING : 12 August 2022

DATE OF JUDGMENT : 12 August 2022

APPLICANTS COUNSEL

: Adv. X. van Niekerk/Mr Ebersöhn

APPLICANTS ATTORNEYS

: Gerrie Ebersöhn Attorneys