

REPUBLIC OF SOUTH AFRICA



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

CASE NUMBER: 40781/18

DELETE WHICHEVER IS NOT APPLICABLE

1.REPORTABLE: NO

2.OF INTEREST TO OTHER JUDGES: NO

3.REVISED: NO

Judge Dippenaar

In the matter between:

RIDWAN THOKAN

PLAINTIFF

AND

MARTIN ANDRE KRIEGLER

FIRST DEFENDANT

PAM GOLDING PROPERTIES (PTY) LTD

SECOND DEFENDANT

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 10h00 on the 28th of October 2022.

DIPPENAAR J:

[1] The parties will be referred to as in the action proceedings. The plaintiff, as applicant, applies for leave to appeal against a portion of the judgment and order granted by me on 13 September 2022 in terms of which the first defendant's second special plea was upheld and the applicant was directed to pay the first respondent's costs.

[2] The second special plea was that the relief sought in prayer A was incompetent and/or bad in law as the first defendant is not and has never been in possession of the deposit nor the interest on the deposit and the deed of sale imposes no contractual obligation on the first defendant to repay the deposit or any interest, or to pay it or to repay it or to refund it. It was further pleaded that the first defendant and the second defendant cannot both pay, repay or refund the same deposit with the interest on it. Consequently, any order to that effect would be bad in law and incapable of performance. The application is opposed by the first defendant.

[3] My judgment is comprehensive and I stand by the reasons set out therein.

[4] In his application for leave to appeal, the plaintiff raises various grounds for leave to appeal in support of the contentions that (i) the second special plea should not have

been upheld and (ii) an order should not have been granted directing the plaintiff to pay the first defendant's costs.

[5] The grounds are predicated on the contentions that this court *“did not exercise her discretion judicially and/or failed to consider or adequately consider and/or was influenced by incorrect principles and/or [was] affected by a misdirection on the facts, or reached a decision that could not reasonably have been reached by a court properly directing itself to the relevant facts and principles in the grant of the relief challenged and/or erred in the judgment”*.

[6] The plaintiff argues that there are reasonable prospects of success that another court will grant a different costs order as envisaged by s 17(1)(a) of the Superior Courts Act¹ and seeks leave to appeal to the Full Court. In the present instance it was not contended by the plaintiff that there are compelling reasons to grant leave to appeal as envisaged by s 17(i)(a)(ii) of the Act.

[7] Leave to appeal may only be granted where a court is of the opinion that the appeal would have a reasonable prospect of success, which prospects are not too remote². A sound rational basis for the conclusion that there are prospects of success must be shown to exist³.

[8] The second special plea ultimately devolved into a costs argument, the plaintiff having conceded that he was not entitled to an order in terms of prayer A of his particulars of claim during an application for separation at the commencement of the trial. As the second special plea was upheld, costs followed the result and the plaintiff was directed to pay the first defendant's costs. The plaintiff argued that such costs order did not take all the relevant facts into account.

¹ 10 of 2013

² Ramakatsa and Others v African National Congress and Another [2021] JOL 49993 (SCA) para [10]

³ Smith v S [2011] ZASCA 15; MEC for Health, Eastern Cape v Mkhitha [2016] ZASCA 176, para [17]

[9] The applicant argues that the costs order granted departed from the general rule that the successful party is entitled to its costs. It argued that the court *mero motu* modified the relief sought as the plaintiff's claim against the first defendant was dismissed whereas the first defendant had sought an outright dismissal of the plaintiff's claim. The plaintiff had sought an order for payment against the first and second respondent's jointly. It was argued that plaintiff succeeded in the principal relief he had claimed, being repayment of the full deposit.

[10] It was argued that the plaintiff had during the separation application launched by the first defendant at the commencement of the hearing abandoned his claim against the first defendant. Reliance was placed on *Jacobz NO v De Clerk and Another*⁴ in support of the proposition that he could abandon or adjust the relief from the bar at trial. In my view, *Jacobz* is however distinguishable and does not avail the plaintiff, considering the facts and the context of that judgment.

[11] The parties are in agreement that the exercise of a discretion in relation to costs is a discretion in a strict sense. As held by the Constitutional Court in *Giddey NO v JC Barnard & Partners*⁵ :

"The ordinary approach on appeal to the exercise of a discretion in the strict sense is that 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, if it is shown that the discretion has not been exercised judicially or has been exercised based on a wrong appreciation of the facts or wrong principles of law".

[12] The first defendant, in opposing the application relies on the principles enunciated in *Jacob G Zuma v the Office of the Public Protector and Others*⁶ that in the absence of an appeal against the merits and factual findings of a court, a party may not rely on those allegations to justify an appeal on considerations of costs only. Such a party faces a formidable hurdle to illustrate a reasonable prospect of success as the court exercises a true discretion. He argues that an appellate court will not interfere with

⁴ [2021] ZAWCHC 49 paras [12] and [13]

⁵ *Giddey NO v JC Barnard & Partners* [2006] JOL 18229 (CC) para [19]

⁶ (1447/18) [2020] ZASCA 138 (30 October 2020) para [18]

the exercise of the discretion pertaining to costs, unless there was a material misdirection⁷ and that no material misdirection was illustrated by the plaintiff.

[13] I have considered the papers filed of record and the grounds set out in the application for leave to appeal as well as the parties' extensive arguments for and against the granting of leave to appeal. I have further considered the submissions made in their respective heads of argument and the authorities referred to by the respective parties.

[14] In applying the relevant principles to the grounds advanced in the notice of leave to appeal and in argument, I conclude that the appeal would not have a reasonable prospect of success as contemplated in s17(1)(a) of the Act.

[15] It follows that the application must fail. There is no basis to deviate from the normal principle that costs follow the result.

[16] The first defendant seeks costs on an attorney and client scale based on clause 15.3 of the agreement concluded between the parties. It was held in my judgment that the agreement had lapsed and that costs should be granted on the normal scale as between party and party.⁸ I am not persuaded that the costs of this application should be any different.

[17] I grant the following order:

The application for leave to appeal is dismissed with costs.

⁷ Zuma supra para [19]-[22]

⁸ At para [66]

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

APPEARANCES

DATE OF HEARING : 27 October 2022

DATE OF JUDGMENT : 28 October 2022

PLAINTIFF'S COUNSEL : Adv. Y. Alli

PLAINTIFF'S ATTORNEYS : Thokan Attorneys

FIRST DEFENDANT'S COUNSEL : Adv. L. Schäfer

FIRST DEFENDANT'S ATTORNEYS : Amod Van Schalk Attorneys