

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

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

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B.C. WANLESS
September 2023

27

CASE NUMBER: 2022 - 035571

In the matter between:

AMBITIOUS

GROUP

(PTY)

LIMITED

Applicant

and

NDUMISO SIYABULELA MDLETSHE

First

Respondent

SIPHELELE MBONGI DUNYWA

Second

Respondent

This judgment was handed down electronically by circulation to the parties' and/or the parties' representatives by email and by being uploaded to Case Lines. The date and time for hand-down is deemed to be 10h00 on 27 September 2023

JUDGMENT (LEAVE TO APPEAL)

WANLESS AJ

Introduction

[1] Pursuant to an application initially instituted on an urgent basis (*“the main application”*) and on the 12th of June 2023, this Court delivered a judgment (revised on 23 June 2023) and made the following order, namely:-

[1] *That pending final determination of Part B attached to this application, any person or entity acting in concert with the Respondents, are hereby interdicted from removing and/or deleting the account of the Applicants' Youtube channel;*

[2] *That it be ordered that the Second Respondent be interdicted from raising any copyright/ownership dispute against the works of the Applicants with any other Digital Streaming Platform (**“DSP”**) inclusive of the First Respondent, Spotify, iTunes, Deezer, authored by the Applicants from 15 June 2022, pending final determination of Part B.*

[3] *The Second Respondent is ordered to pay the costs of this application including the costs of two Counsel, one of which is Senior Counsel.*

[2] The Respondents referred to in the said order were YOUTUBE CHANNEL (*“the First Respondent”*) and AMBITIOUS GROUP (PTY) LIMITED (*“the Second Respondent”*). On the 27th of June 2023 the Second Respondent (*hereafter referred to as “the Applicant”*) lodged an application for leave to appeal against the judgment and order of this Court in the main application. That application was heard on the 28th of August 2023 and is the subject matter of this judgment. Pursuant to the order granted by this Court and *prior* to the application for leave to appeal being heard, NDUMISO SIYABULELA MDLETSHE and SIPHELELE MBONGI DUNYWA instituted an application (*“the section 18 application”*) in terms of subsections 18(1) and 18(3) of the Superior Courts Act 10 of 2013 (*“the Act”*). In the section 18 application the relief sought was as follows:

1. *Dispensing with the forms and service provided in the Uniform Rules of Court and condoning non-compliance with the Rules relating to service and time periods in terms of Rule 6(12);*
2. *In terms of section 18(1), read with section 18(3), of the Superior Courts Act, Act10 of 2013, it is ordered that the operation and execution of the Judgment and Order of this Court (per Wanless AJ), under case number: 2022/035571, dated 12th June 2023, revised on 23rd June 2023, shall not be suspended pending a decision on the second respondent's application for leave to appeal and, in the event of leave to appeal being granted, the outcome of such appeal.*

3. *That the Respondents opposing this application be ordered to pay the costs thereof, on an attorney and client scale, including the cost of senior counsel.*

4. *Further and alternative relief.*

[3] On the 22nd of August 2023 this Court delivered judgment in respect of the section 18 application and granted the following order:

1. *In terms of subsection 18(1), read with subsection 18(3), of the Superior Courts Act, Act 10 of 2013, it is ordered that the operation and execution of the Judgment and Order of this Court, under case number 2022/035571, dated 12 June 2023 and revised on 23 June 2023, shall not be suspended pending a decision on the Second Respondent's application for leave to appeal and, in the event of leave to appeal being granted, the outcome of such appeal;*

2. *The Second Respondent is ordered to pay the costs of this application, including the costs of Senior Counsel.*

[4] In the present application for leave to appeal and for ease of reference, AMBITIOUS GROUP (PTY) LIMITED will be referred to as "*the Applicant*" whilst NDUMISO

SIYABULELA MDLETSHE and SIPHELELE MBONGI DUNYWA will be referred to as “*the Respondents*” throughout this judgment.

Grounds of Appeal

- [5] The Applicant has instituted its application for leave to appeal to the Supreme Court of Appeal (“SCA”), *alternatively*, the Full Bench of this Division, in terms of both subsections 17(1)(a)(i) and (ii) of the Act.
- [6] In terms of subsection 17(1)(a)(i) of the Act the Applicant submits that leave to appeal should be granted in light of:
- 6.1 the failure of the Respondents to prove that they had a contractual right to vindicate;
 - 6.2 the failure of the Respondents to prove that it was that contractual right which was infringed by the Applicant; and
 - 6.3 this Court erring by correctly holding that specific allegations as to fault were made in the Founding Affidavit but incorrectly finding that the Applicant causing several take down notices to be served upon YOUTUBE CHANNEL constituted fault in the form of intent and did not need to be specifically identified as such in

the Founding Affidavit for the Respondents to satisfy the requirements of the *lex aquilia*.

- [7] In his Heads of Argument and during the course of argument before this Court, Counsel for the Applicant combined subparagraphs 6.1; 6.2 and 6.3 hereof under the heading of “FIRST MAIN BASIS FOR LEAVE TO APPEAL” Subparagraphs 6.1 and 6.2 herein were described as “*The locus standi issue*” whilst subparagraph 6.3 was described as “*The no cause of action issue*”.
- [8] It was also submitted that this Court had erred by granting costs and expressing same to include the costs of Senior Counsel where such an order is incompetent in our law. However, in the Applicant’s Heads of Argument, it was conceded (correctly in the opinion of this Court) that: “...*this ground on its own should not warrant that leave to appeal be granted.*”
- [9] In terms of subsection 17(1)(a)(ii) of the Act (described by the Applicant’s Counsel as the “SECOND MAIN BASIS FOR LEAVE TO APPEAL”) the Applicant submits that leave to appeal should be granted in light of the fact that this Court failed to consider the Applicant’s second point *in limine* (the *locus standi* issue) at all, together with the submissions made and authorities relied upon in respect thereof. The submission was further made that it is in the interests of justice that a litigant has its dispute determined fairly based upon the correct legal principles and requirements. Finally, it was also submitted that a litigant should retain the opportunity of showing that the judgment appealed against is incorrect.

The law

[10] The test for the granting of leave to appeal pertinent to the present matter is set out in subsection 17(1) of the Act as follows:

(1) *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;*
or

(ii) *there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration; “*

The merits

[11] On behalf of the Respondents, Adv Ngcukaitobi SC submitted that in light of the fact that the order granted was not final in effect, it was therefore not appealable and this Court should dismiss the application on this ground alone. Whilst Adv Ngcukaitobi SC did not appear for the Respondents at the section 18 application the parties were *ad idem* at that application that the order granted by this Court on the 12th of June 2023 *did* have the effect of a final judgment and was thus appealable¹. Having heard full argument from both parties in respect of this issue, this Court made a ruling in respect

¹ Paragraphs [5] and [6] of this Court's judgment (Section 18 application) dated 22 August 2023

thereof that the order granted was of final effect and thus appealable. As set out earlier in this judgment the application proceeded with this Court making an order on the 22nd of August 2023². In the premises, this Court has already ruled on this issue. Further, even if this Court was incorrect in that regard, in light of the decision reached in the present application, the appealability of the order ultimately has no bearing on the application by the Applicant for leave to appeal.

First main basis for leave to appeal

The *locus standi* issue

[12] For the Applicant, Adv van Nieuwenhuizen submitted that the Respondents had failed to establish that they had the requisite *locus standi* to institute the main application for the relief sought and granted by this Court.

[13] In the first instance, it is imperative to note that at the hearing of the section 18 application, Adv Baloyi SC (with her Adv van Nieuwenhuizen) on behalf of the Applicant (*the Respondent in that application*) specifically conceded and did not persist with the same point taken, *in limine*, namely that the Applicants (*Respondents in the present application*) did not have the requisite *locus standi* to institute that application. In its judgment in the section 18 application, this Court found that the said concession had been correctly made. For that reason, coupled with the reasons set out hereunder, this Court not only remains of the opinion that the Respondents had the requisite *locus standi* to institute the main application but that, within the

² Paragraph [3] *ibid*

context of the present application, there is no reasonable prospect of another Court finding that the Respondents did not.

[14] In this regard, it was pointed out by Adv Ngcukaitobi SC that there was nothing in either the various agreements entered into between the parties or the agreements entered into between the Respondents and third parties that prohibited the Respondents from seeking protection of their rights in and to certain songs (without the joinder of any other parties who may have been involved in the creation thereof and who may also have certain proprietary rights in relation to those songs). It is also worthy to note, at this stage, that a further point *in limine* raised by the Applicant at the hearing of the main application, in respect of non-joinder, was abandoned by the Applicant, *alternatively*, not persisted with (once again, correctly in the opinion of this Court). As to the argument on behalf of the Applicant that the Respondents had failed to show that these other parties had ceded their rights to the Respondents, it was also pointed out by Counsel for the Respondents that this point had never been raised (certainly not in oral argument before this Court) on behalf of the Applicant when the main application had been heard by this Court.

[15] With regard to the submission made on behalf of the Applicant that the failure of this Court to deal directly in its judgment with the *locus standi* issue, making no specific finding in respect thereof and that this constitutes a ground for appeal, Counsel for the Respondents submitted that in considering whether or not to grant the Applicant leave to appeal and when deciding whether there are reasonable prospects that another court would come to a different decision, it is the decision reached by the

court *a quo* which requires examination and *not* the *reasons* for reaching that decision. If the outcome is correct (and therefore would not be interfered with by an appeal court) then it matters not if the reasons for reaching that decision were incorrect.

[16] In the premises, particularly since (on the submissions made by Adv Ngcukaitobi SC) the conclusion reached by this Court, after a proper consideration of the facts and the law³, was correct, it matters not that this Court did not deal directly with the point taken on behalf of the Applicant that the Respondents lacked the requisite *locus standi* to institute the application and, on the Applicant's submissions, erred in finding that the only point *in limine* ultimately relied upon by the Applicant was the "*no cause of action issue*".⁴

The no cause of action issue

[17] The Applicant attacks the finding that this Court made by correctly holding that specific allegations as to fault were made in the Founding Affidavit but incorrectly finding that the Applicant causing several take down notices to be served upon YOUTUBE CHANNEL constituted fault in the form of intent and did not need to be specifically identified as such in the Founding Affidavit for the Respondents to satisfy the requirements of the *lex aquilia*⁵.

³ Paragraphs [22] to [24], inclusive of this Court's judgment

⁴ Paragraph [16] of this Court's judgment

⁵ Paragraph [24] of this Court's judgment

[18] Once again, Counsel for the Respondents opposes this as a valid ground of appeal and relies on the fact that this Court ultimately came to the correct finding which negates any reasonable prospects of another court coming to a different finding.

Second main basis for leave to appeal

[19] Based as this ground of appeal is on the submission that leave to appeal should be granted in light of the fact that this Court failed to consider the Applicant's second point *in limine* (the *locus standi* issue) at all, together with the submissions made and authorities relied upon in respect thereof and the fact that, in terms of subsection 17(1)(a)(ii) of the Act, there must be some compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration, it must follow, for, *inter alia*, the reasons set out above, that this ground does not assist the Applicant in this application.

[20] Once again, even if this Court was incorrect in failing to consider the point *in limine* raised by the Applicant with regard to the Respondents' *locus standi* this did not effect the finding made by this Court and whether another Court would reach a different decision when applying the correct principles of law to the facts of the matter. There are no compelling reasons for this Court to grant the Applicant leave to appeal (within the meaning thereof in terms of subsection 17(1)(a)(ii) of the Act) and the judgment of this Court is certainly not in conflict with any previous judgments on the issues raised in the main application and adjudicated upon by this Court.

Conclusion

[21] After careful consideration, this Court is in agreement with the submissions made on behalf of the Respondents. At the end of the day, when applying the correct test to this application for leave to appeal, this Court must consider the substance of its judgment rather than the form.

[22] As to the prospects of whether another Court would (*not could*) come to a different decision, in addition to the reasons negating same and as already set out in this judgment, is the fact that, in light of the relief sought in PART B of the application, the less stringent test of establishing a *prima facie* right applies. This was dealt with thoroughly in this Court's judgment pertaining to the main application and will not be repeated herein⁶. In the premises, this strengthens the case for the Respondents that an appeal court would not come to a different finding to that of this Court.

[23] In the premises, in light of all of the foregoing, this Court holds that the application for leave to appeal to the Full Bench of this Division (Applicant's Counsel submitting during the course of argument that an appeal to the SCA was not appropriate) should be dismissed. As to costs, there are no exceptional circumstances present in this matter to justify an order departing from the usual order that costs should follow the result.

[24] This Court makes the following order:

⁶ Paragraphs [27] to [31] inclusive read with paragraph [33] of this Court's judgment

24.1 The application for leave to appeal is dismissed.

24.2 The Applicant is to pay the costs of the application for leave to appeal.

B.C. WANLESS
Acting Judge of the High Court
Gauteng Division, Johannesburg

Heard: 28 August 2023
Judgment: 27 September 2023

Appearances

For Applicant: Adv. H. P. van Niewenhuizen
Instructed by: Rechen Attorneys Inc.

For Respondents: Adv. T. N. Ngcukaitobi SC
Instructed by: Friedland Hart Solomon & Nicolson
Attorneys