

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NO:

31783/2014

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| (1) | <u>REPORTABLE: YES / NO</u> |
| (2) | <u>OF INTEREST TO OTHER JUDGES:</u> <u>YES/NO</u> |
| (3) | <u>REVISED.</u> |
| | |
| DATE | |

In the matter between:

BLAKEY INVESTMENTS (PTY) LTD

Applicant

And

RECKITT BENCKISER SOUTH AFRICA (PTY) LTD
Respondent

First

THE SHERIFF OF THE HIGH COURT, DURBAN NORTH

Second Respondent

JUDGMENT ON APPLICATION FOR LEAVE TO APPEAL

MAKUME, J:

[1] This is an Application for Leave to Appeal the judgement dated the 28th April 2023 in which judgement this Court dismissed with costs an application in

terms of Rule 45A of the Uniform Rules of Court. The judgment was only handed down on the 12 June 2023 as a result of administrative problems.

[2] The background facts leading to that application were fully set out in my judgement and I do not need to repeat same save to say that this application is an attempt by the Applicant to recycle the issues that have already been dealt with by the High Court including the SCA and the Constitutional Court.

[3] This Court is requested to grant Leave to Appeal on the following grounds

3.1 Firstly that this Court erred by denying the Applicant a right to fair public hearing and access to court in terms of Section 34 of the Constitution of South Africa by handing down judgment despite there being an application by the Applicant to adduce further evidence.

3.2 That this Court erred in law by prematurely handing down judgement because the Common Law principle **of set off allows for an automatic** set off against a debt assuming the validity of the Applicants claim against Reckitt under Case Number 42182/2014.

3.3 That this Court erred in its interpretation of the decided cases dealing with Rule 45A.

[4] The test to be applied in deciding whether or not Leave to Appeal should be granted is governed by the provisions of Section 17(1) of the Superior Court Act number 10 of 2013 which provides as follows:

“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 judgements.”

- [5] In my view there are only two grounds that merit attention firstly it is whether this Court erred in handing down judgement and ignored the Applicant’s application to lead further evidence. Secondly whether this Court misdirected itself in its interpretation of the provisions of Rule 45A and the decided cases therein.
- [6] Judgement in this matter was signed by me on the 28 April 2023 by that time there had been no application by the Applicant seeking an opportunity to adduce further evidence. There is no law or rule that grants any judge to revisit a judgement that has already been signed. The only way that such a judgment could be revisited is by an application to rescind same in terms of Rule 42 of the Uniform Rules or in terms of the Common Law.
- [7] The Applicant maintains that sometime after submissions had been made and argued it then received legal opinion from Senior Counsel to the effect that their former attorneys and Counsel had given them wrong advice hence their application to adduce further evidence based on new advice by their new Counsel. The fallacy with this contention is that Senior Counsel’s advice is unassailable Applicant should be in the know that such opinion could still have to be argued and only if found to be sound then a judge would give it effect. As at the moment it still remains an untested opinion.
- [8] The argument that Applicant was denied fair trial in contravention of its Constitutional right entrenched in Section 34 is once more a redherring. The Applicant is diverting attention from the main issue which is that a judgement granted against it as far back as 2014 has been tested right up to the Constitutional Court and was found to be valid.
- [9] It is trite law that as a rule once a party has closed its case it is not permitted to call further evidence save in rebuttal. In a number of cases starting with **Kemp v Mullan (1858) 3 Searle 87 at 88; Du Plessis v Ackerman 1932**

EDC 139 at 147; Mkhwanazi v Van der Merwe 1970 (1) SA 609 (D); Barclays Western Bank v Gunas 1981 (3) SA 91 – D it was held that the Court will be less ready to accede to an application for leave to reopen a case for the purposes of leading fresh evidence and will require a strong case to be made out before granting that privilege where argument has already been concluded.

[10] In this matter argument had been concluded on the 18th April 2023 and judgement was reserved. In its application the Applicant did raise the issue of set off in paragraph 10 of their founding affidavit. That aspect was thoroughly debated and in my judgement I dealt with set off. There is accordingly no new evidence to have been considered by me.

[11] The second ground of appeal is that this court erred in its interpretation of the decided case law dealing with Rule 45A. The legal principle applicable to Rule 45A were correctly summarised in MEC Department of Public Works and Others vs Ikamva Architects and Others 2022 (6) SA 275 ECB at page 309 paragraph 82 as follows:

“Courts enjoy constitutionally supported inherent jurisdiction to control their own processes taking into account the interests of justice. It appears as if this inherent discretion operates independently of the provisions of Uniform Rule 45A. Execution must generally be allowed. This is so even in cases where a stay is sought pending the determination of proceedings still to be instituted. Court will generally grant a stay of execution if the Applicant demonstrate that real and substantial justice requires this or where an injustice will result if execution proceeds. The Courts discretion must be exercised judicially but cannot otherwise be limited.”

[12] This application is primarily based on the argument that this Court refused to hear further evidence from the Applicant prior to handing down its judgement. This refusal so argues the Applicant entitles the Applicant to be granted leave so as to adduce the fresh evidence which the Applicant says came to its

knowledge after the close of argument and whilst judgement remained reserved.

[13] A trial Court has a general discretion to allow a party who has closed his case to lead further evidence at any time up to judgement (See: **Barclays Western Bank Ltd vs Gunas and Another 1981 (3) SA 91 (1)**). However this discretion is not to be exercised without due regard to prejudice on the opposing litigant. The Court in **Terblanche vs Minister of Safety and Security [2009] 2 ALL SA 211 (C) at paragraph 89** held that where the reason for a party seeking to reopen its case is blatantly misused by him it is a sound basis for the Court to show its disapproval.

[14] The Applicant has since this matter started in 2014 placed blame for not filing documents or furnishing response on its legal advisers. It is not surprising that Tsoka J in the full bench decision dismissing the Appeal against Rescission of judgement at paragraph 9 of that judgement referred to the judgement in **Sallojee and Another NNO v Minister of Community Development 1965 (2) SA 135 (A) at 141 (C)** in which that Court reasoned as follows:

“There is a limit beyond which a litigant cannot escape the result of his attorneys lack of diligence or insufficiency of the explanation tendered. To hold otherwise might have disastrous effect upon the observation of the Rules of this Court. Consideration *ad misericordiam* should not be allowed to become an invitation to laxity.”

[15] The Applicant’s counterclaim in case number 42182/2014 was drafted by Senior Counsel and no set off was pleaded Set off was raised for the first time in the application to stay the writ and as I indicated earlier this issue was dealt with in paragraph 25 of my judgement. The Applicant had in that instance sought to rely on Rule 22 (4) of the Uniform Rules of Court.

[16] Section 17 (1) of the Superior Court Act which I have quoted above besides requiring a judge to have an opinion that the Appeal would have a reasonable

prospects of success also states that if there is some other compelling reason the Appeal should be heard including conflicting judgements.

[17] I must categorically indicate that I hold the view that there are no reasonable prospects that this Appeal would succeed even if this Court had granted the Applicant leave to lead further evidence. The question remains whether there are any compelling reasons that the Appeal should be heard.

[18] The grounds for allowing further evidence on appeal were stated by Tshiqi JA in **Seedat v S 2017 (1) SACR 141 SCA at paragraph 21** as follows:

“There should be a reasonably sufficient explanation, based on allegations which may be true why the evidence which is sought to be led was not led at the trial. There should be a prima facie likelihood of the truth of the evidence. The evidence should be materially relevant to the outcome of the trial.”

[19] There is in my view no compelling reason to grant leave. The Applicant is clearly on a trajectory aimed at dragging this matter indefinitely based on flawed reasoning.

[20] I need also to deal with the contention by the Applicant that this Court erred in failing to hold that my judgement was not final until it was handed down even if it had already been signed. This Court has been referred to the Constitutional Court decision in **Maphango and Others v Aengus Lifestyle Properties (Pty) Ltd 2012 (3) SA 531 (CC) at 127.**

[21] Paragraph 127 of that judgement is part of a minority judgement by Zondo AJ as he then was. Secondly that paragraph has no reference to what is being contented to by the Applicant. My further reading of that judgement took me to paragraph 137 which to me appears to be relevant to the issues in this matter it deals with an application to stay.

[22] Zondo AJ's judgement despite being a minority judgement is not supportive of the Applicant's contention. It clearly emphasises on the timing of the bringing

of such application and the prejudice occasioned to the Respondent. Paragraph 137 reads as follows:

“If the Applicants wanted a stay the proper forum and time for that application was before the High Court and before it handed down its judgement. Once the High Court had delivered its judgement without that application having been made there was no room for the application because from that time on there was a judgement in favour of the Respondent which could only be set aside if it were found to be wrong. In case I am wrong in the view that this application could have been made only before the High Court handed down its judgement then the least that the Applicants would be required to do if they applied for a stay of the Appeal to the Supreme Court of Appeal would have been to explain why they did not make that application before the High Court handed down its judgement and why they took as long as they did to bring that application. They would have had to give a proper explanation for all of this. The Respondent would have been entitled to oppose the application for a stay and to show the prejudice that a stay would occasion it. On the same basis if the Applicants had applied to this Court for a stay of the appeal pending the referral, once again of their complaint to the tribunal they would have had to explain why they were only seeking to do this after three years of litigation and deal with the prejudice to the Respondent. They would also have had to explain why they must be given another opportunity three years later to refer their complaint and why they withdrew their complaint before the tribunal at a time when they were about to be afforded a hearing that could have resulted in an award in their favour which would have prevented the litigation in the High Court, Supreme Court of Appeal and in this Court. The main judgement grants the Applicants a stay without their having had to give any explanation for their withdrawal of their complaint in the tribunal and for their failure to apply for a stay all these years.”

[23] It is now almost nine years since summary judgement was granted and because of the various failed attempts to avoid execution of that judgement Reckitt the Respondent has been seriously prejudiced. There is no basis on which the Applicant should be granted another opportunity to recycle the whole legal process.

[24] The Constitutional Court in the matter of **S v Shaik and Others 2008 (1) SACR 1** in dealing with the test for granting leave to appeal as well as the law regarding the admission of new evidence on appeal held as follows at paragraph [15] as well as [17].

“[15] Leave to Appeal will be granted if an Applicant raises a Constitutional matter or an issue connected with a decision on a Constitutional matter, and if it is in the interest of justice to grant leave to appeal. Whether it is in the interest of justice for an application for leave to appeal to be granted depends on a careful and balanced weighing up of all relevant factors, including the importance of the Constitutional issues and the prospects of success. With regard to the prospects of success the Court must have regard to and make a reevaluation of the evidence which is before it.

[17] In this application to introduce further evidence the Applicants rely on rules 30 and 31 of the rules of this Court. Rule 30 incorporates amongst other Section, S 22 of the Supreme Court Act.”

[25] In **Prince vs President Cape Law Society and Others 2002 (1) SACR 431 CC** the Court held that if the evidence sought to be adduced under Rule 31 is not incontrovertible then it is inadmissible. The Constitutional Court in **Rail Commuters Action Group and Others vs Transnet Ltd t/a Metrorail and Others 2005 (2) SA 359 CC** confirmed the ruling in Prince by concluding that the evidence sought to be introduced was not admissible since it was “all put in issue by the Respondent and therefore falls to be excluded on that basis alone. The Court further held that Rule 31 will find no application were the facts sought to be canvassed are irrelevant or genuinely disputed in other words where they are not incontrovertible.

[26] At paragraph 25 of the Shaik decision the Court concluded as follows:

“The second route by which new evidence can be adduced is provided by Rule 30 which as already stated incorporates S22 of the Supreme Court Act. That Section deals with the powers of the Court on hearing appeals.

Although appeal Courts have a discretion under Section 22 leave to adduce further evidence is ordinarily granted only where special grounds exists or where there will be no prejudice to the other side and further evidence is necessary in order to do justice between the parties.”

[27] The further evidence which the Applicant sought to introduce is disputed. Secondly there is prejudice to Reckitt and it is not in the interest of justice to further prolong this matter it has done its full circle up to the Apex Court and the time has now arrived to put a stop to this.

[28] In the result I have come to the conclusion there are no reasonable prospects of success of an appeal neither are the compelling reason why this judgement should go on appeal. The application falls to be dismissed.

ORDER

1. The Application for leave to appeal the judgement handed down on the 12th June 2023 is dismissed.
2. The Applicant is ordered to pay the costs of this application.

Dated at Johannesburg on this day of October 2023

**M A MAKUME
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG**

Appearances:

DATE OF HEARING : 26 SEPTEMBER 2023
DATE OF JUDGMENT : 03 OCTOBER 2023

FOR APPLICANT : ADV G.D. HARPUR SC
WITH : R KIRSTEN
INSTRUCTED BY : PATHER & PATHER, DURBAN

FOR RESPONDENT : ADV HP PRETORIUS
INSTRUCTED BY : EDWARD NATHAN SONNENBERG INC.