

REPUBLIC OF SOUTH AFRICA



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

CASE NO: 55974/2021

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

20 October 2023

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DATE

SIGNATURE

In the matter between:

LOGGONATHAN MOODLEY

Applicant

And

THEODOR WILHELM VAN DEN HEEVER N.O.

First Respondent

CLINTON ARTHUR JOHANNES N.O.

Second Respondent

JUDGMENT

MIA, J

[1] The applicant brings this application for leave to appeal against the judgment and order handed down on 13 March 2023 by this court, where the respondents instituted an application for striking out and declaratory relief. The court granted an order as follows:

16.1 Paragraphs 22.2 -22.16 and 22.27 and 22.28 as well as Annexures "SO" and "AA" are struck from the record.

16.2 Draharama Lingum Moodley is declared the sole member of Co-props 1099 CC (Registration No 1997/031376/23) (Co-Props CC) from August 1997;

16.3 The respondent is declared not to be, and to have never been a member of Co-Props CC;

16.4 The respondent shall pay the costs of the application."''

[2] Having regard to the test for leave to appeal as established by section 17(1)(a) of the Superior Courts Act 10 of 2013 whether reasonable prospects of success exist, the tests referred to were the oft cited *Mont Chevaux Trust v Goosen*¹ and *Ramakatsa and Others v African National Congress and Another*² where the Supreme Court of Appeal indicated that there might be reasons to entertain an appeal:

[10] Turning the focus to the relevant provisions of the Superior Courts "Act[5] (the SC Act), leave to appeal may only be granted where the judges concerned are of the opinion that the appeal would have a reasonable prospect of success or there are compelling reasons which exist why the appeal should be heard such as the interests of justice.[6] This Court in *Caratco*[7], concerning the provisions of s 17(1)(a)(ii) of the SC Act pointed out that if the court is unpersuaded that there are prospects of success, it must still enquire

¹ 2014 JDR 2325 (LCC) at para 5 and 6

² [2021] ZASCA 31 (31 March 2021) Para 10

into whether there is a compelling reason to entertain the appeal. Compelling reason would of course include an important question of law or a discreet issue of public importance that will have an effect on future disputes. However, this Court correctly added that 'but here too the merits remain vitally important and are often decisive'.^[8] I am mindful of the decisions at high court level debating whether the use of the word 'would' as opposed to 'could' possibly means that the threshold for granting the appeal has been raised. If a reasonable prospect of success is established, leave to appeal should be granted. Similarly, if there are some other compelling reasons why the appeal should be heard, leave to appeal should be granted. The test of reasonable prospects of success postulates a dispassionate decision based on the facts and the law that a court of appeal could reasonably arrive at a conclusion different to that of the trial court. In other words, the appellants in this matter need to convince this Court on proper grounds that they have prospects of success on appeal. Those prospects of success must not be remote, but there must exist a reasonable chance of succeeding.

[3] The the applicant submitted that the court erred in striking out certain material based on privilege and irrelevance in circumstances where such material contained admissions unrelated to any pre-existing dispute between the parties. It was contended that privilege did not cover such admissions. On the second ground, it was submitted that the court erred in granting a declaratory order that the applicant was not and has never been a member of the corporation in that the court did not place sufficient weight on sections 14(1) and 14(2) of the Close Corporation Act 69 of 1984 (the Act) read with regulation 2(5) of the Administrative Regulations published under GN R2487 in Government Gazette 9503 of 16 November 1984 which render the founding statement and the amended founding statement conclusive evidence in respect of all the requirements of the Act in respect of registration of the corporation. This leg regarding section 14 was not pursued during counsel's submissions.

[4] Counsel submitted that once the founding statement of the close corporation was presented, the membership could not be challenged except through cessation of membership having regard to section 36 of the Act. He argued that this aspect was considered in the main application, and no merit was found in this inquiry. He continued moreover, that the respondent has not demonstrated the grounds on which the applicant ceased to be a member of Co-pros CC in terms of section 36 of the Act. The respondents proceeded with their application, he argued in terms of section 24 of the Act, which required a member's contribution. Counsel submitted that the applicant had complied with the requirement that the membership contribution be paid. The factual inquiry was neither here nor there. It did not matter whether the member's fee was paid by the applicant or paid on behalf of the applicant; the fee was paid, and there was compliance with the requirement. He also submitted that the Registrar of Companies had not been joined the application. The Registrar did not have an opportunity to comment on the application or the authenticity of the membership forms.

[5] Furthermore, Counsel for the applicants submitted that the court erred in striking out the relevant passages as there was no pre-existing dispute regarding the applicant's membership in the close corporation. The only dispute between the parties related to the value placed on the applicant's membership as was evident from the unconcluded settlement agreement from the contents of the e-mail between the parties' respective attorneys on 27 September 2021. The correspondence conceded the applicant's membership, and only the value was the subject of negotiations. Thus it was submitted, that the correspondence and the concession were directly relevant to the question before the court.

[6] In rebuttal, counsel for the respondent argued that the submission on behalf of the applicants in respect of section 36 of the Act, had not been argued based on the heads of arguments and was not related to the grounds raised in the application for leave to appeal or the heads of argument. The submission made by counsel for the applicant relating to section 36

specifically related to the cessation of membership on application to a court. This counsel argued was not raised as grounds for an appeal and was not covered in the heads of argument. In any event, she submitted an application in terms of section 36 of the Act, was not the relief the respondents had sought in the application before the court. The court understood the application as a declaratory order that the applicant was never a member. The relief was granted based on the evidence that the applicant was not a member of the close corporation.

[7] She continued to submit, that counsel for the applicant, dealt with section 14 of the Close Corporations Act in their heads of argument, which referred to a certificate of incorporation and not a founding statement. Sections 12 and 15 of the Close Corporation Act, she argued, deal with the founding statement and do not state that the founding statement and amended founding statement are conclusive documents. In contrast, the Certificate of Incorporation which section 14 of the Act deals with is a conclusive fact that the closed corporation is registered. It bears no reflection on the membership and the change in membership however. The content of the founding statement and an amended founding statement do not bear the same level of certainty and are different. Section 14, which the applicant's ground of appeal is based on does not provide conclusive evidence concerning membership of the closed corporation. Moreover, their reliance on section 36, which was not raised as a ground of appeal in the application for leave to appeal, is misplaced and based on incorrect legal facts.

[8] Having considered the submissions of both counsel, the applicant must persuade the court that there are reasonable prospects that another court would come to another decision. I am mindful of the aspect to be considered whether there is a compelling question of law or a discreet issue of public importance in the matter that unequivocally demands attention and cannot be ignored. This, too, may afford the applicant an opportunity for leave to appeal.

[9] On the question of striking out, the applicant's own version conceded that there was a discussion between the attorneys and negotiations about an attempt to settle the matter. Thus, introducing the communications relating to the settlement that were the subject of the negotiations was prejudicial to the respondents. Whilst the applicant submitted that there was no question about his membership, the enquiry and his own responses indicate that the questions posed during the enquiry raised questions about his role as a member. The negotiations may thus have been misconstrued as the respondents indicate. In any event, the communications relating to the negotiations are inadmissible being privileged from disclosure. I am not persuaded that another court would come to a different conclusion on this issue.

[10] The ground raised in terms of section 14 was not addressed in his submissions by counsel for the applicant however, to the extent that counsel stands by his heads of argument, section 14 refers to the certificate of incorporation. While the section refers to the founding statement, it provides no conclusive proof of membership. It provides conclusive proof of the registration of the closed corporation. The sections dealing with membership do not deal with any conclusive proof relating to membership and in this present instance, the amended membership of Co-props CC, the close corporation was in question. I applicant has not met the higher threshold for leave to appeal on this ground.

[11] The submission made in respect of section 36 was not a ground of appeal raised in the application for leave to appeal. I deal with this, nonetheless. Section 36, as counsel for respondent correctly submitted deals with a member of a closed corporation's cessation of membership upon application by court order. This would apply when there is an application by a corporation member. The application that served before this court was not such an application for termination of membership in terms of section 36. The application was for a declaratory order that the applicant was not a member of and was never a member of the closed corporation Co-props CC.

[12] For the reasons above, I make the following order:

ORDER

1. The application for leave to appeal is dismissed with costs.

S C MIA
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

Appearances:

On behalf of the applicant : Mr Q Khumalo

Instructed by : Quinton Khumalo Inc

On behalf of the respondents : Adv. A Cooke

Instructed by : Mathopo Moshimane Mulangaphuma Inc

Date of hearing : 13 October 2023

Date of judgment : 20 October 2023

