

REPUBLIC OF SOUTH AFRICA



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

CASE NUMBER: 2022-005166

DELETE WHICHEVER IS NOT APPLICABLE

1.REPORTABLE: NO

2.OF INTEREST TO OTHER JUDGES: NO

3.REVISED: NO

Judge Dippenaar

In the matter between:

XOLANI NCUBE

1st APPLICANT

WARWICK LABORATORIES

2nd APPLICANT

AND

HEALTH AND HYGIENE (PTY) LTD

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 10h00 on the 28th of February 2023.

DIPPENAAR J:

[1] For ease of reference, the parties will be referred to as in the main application proceedings. The first applicant applies for leave to appeal against the whole of the judgment and order granted by me on 13 July 2022. In terms of the order, I dismissed the applicants' urgent application for an interdict to prohibit a shareholders' meeting from taking place in terms of which the first applicant would be removed as a director of the second applicant and steps would be taken to deregister the second applicant. Costs were awarded against the first applicant on the scale as between attorney and client. The respondent seeks the dismissal of the application together with a punitive costs order.

[2] The application for leave to appeal, dated 3 August 2022 was served on the respondent's attorneys via email on 17 August 2022. It was uploaded onto CaseLines on 12 August 2022.

[3] The application for leave to appeal was enrolled for hearing on 6 October 2022. The respondent in its heads of argument of 30 September 2022 raised the issue that the application for leave to appeal was late and that there was no condonation application, thus justifying the dismissal of the application.

[4] The first applicant at the hearing on 6 October 2022, sought a postponement in order to launch a recusal application. The application for leave to appeal was postponed *sine die* and costs were reserved. No condonation application was ever launched.

[5] The respondent challenged the *locus standi* of the second applicant, given that it was deregistered after delivery of the judgment on 13 July 2022. The respondent further on 22 August 2022 delivered a notice in terms of r 30(2)(b) complaining of the failure of the first applicant's attorneys to act absent a proper notice of withdrawal of the applicants' erstwhile attorneys and absent a notice of appointment of record. A notice of appointment as attorneys of record was filed by the first applicant's current attorney of record on 10 October 2022, some weeks after the application was launched.

[6] 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.

[7] In his application for leave to appeal, the first applicant raised various grounds for leave to appeal in support of the contention that there are reasonable prospects of success that another court would grant a different order as envisaged by s 17(1)(a) of the Superior Courts Act¹.

[8] 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. An applicant for leave to appeal faces a higher threshold³ than under the

¹ 10 of 2013

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

³ *S v Notshokovu* Unreported SCA case no 157/15 dated 7 September 2016, para [2]

repealed Supreme Court Act.⁴ A sound rational basis for the conclusion that there are prospects of success must be shown to exist⁵.

[9] At the commencement of the hearing Adv Khumalo, who appeared for the first applicant, sought to raise various issues pertaining to the deregistration of the second applicant which he contended required investigation. A postponement of the application for leave to appeal was requested by Adv Khumalo. The respondent had not been notified of such intention and objected to the procedure adopted, claiming prejudice and its interests in the finality of the litigation.

[10] Absent a formal postponement application and the provision of cogent and compelling reasons for another postponement of the application for leave to appeal, contained in a formal affidavit, there was no proper postponement application which could be entertained. No attempt was made by the first applicant to launch a proper application. I declined to accede to Adv Khumalo's request.

[11] In terms of r 49(1)(b), an application for leave to appeal must be delivered within 15 days of the granting of the order appealed against. A court may, on good cause shown, extend the peremptory fifteen-day period. Delivery of an application envisages both service of the application on the respondent and filing thereof.

[12] The first applicant did not even attempt to seek condonation or to present any grounds illustrating good cause. No facts were placed before court enabling it to exercise the judicial discretion afforded⁶, nor was the court requested to do so.

[13] At the hearing, it was argued that condonation is not required, as the application was uploaded on CaseLines on 3 August 2022. The relevant file on CaseLines did not support that contention. Moreover, the mere filing of an application for leave to appeal,

⁴ 59 of 1959

⁵ Smith v S [2011] ZASCA 15; MEC for Health, Eastern Cape v Mkhitha [2016] ZASCA 176, para [17]

⁶ United Plant Hire (Pty) Ltd v Hills 1976 (1) SA 717 (A) at 720E-G

absent service of the application is improper and defective. It was not disputed that the application was only served on the respondent on 17 August 2022, some 24 days after the delivery of the judgment.

[14] It follows that the application for leave to appeal was delivered late and absent any condonation does not comply with the peremptory requirements of r 49(1)(b). This justifies the dismissal of the application on this basis alone.

[15] I have in any event considered the grounds for leave to appeal advanced by the first applicant both in the notice for leave to appeal and in argument. My judgment is comprehensive and I stand by the reasons set out therein.

[16] In applying the relevant principles to these grounds when measured against the facts, I conclude that the appeal would not have a reasonable prospect of success as contemplated in s17(1)(a)(i) of the Act.

[17] Moreover, the common cause fact that the second respondent was deregistered and steps were taken to do so prior to the launching of the application for leave to appeal, to the knowledge of the first applicant and his legal representatives, has rendered the issues which would arise in any appeal moot and the decision sought would have no practical effect or result⁷. That much was conceded by Adv Khumalo in argument.

[18] It follows that the application must fail.

[19] There is no basis to deviate from the normal principle that costs follow the result. The respondent seeks costs on a punitive scale.

⁷ Premier, Provinsie Mpumalanga v Groblersdalse Stadsraad 1998 (2) SA 1136 (SCA) at 1141D-I; Radio Pretoria v Chairman, Independent Communication Authority of South Africa 2005 (1) SA 47 (SCA) at 55E-56H.

[20] Considering the facts and the first applicant's conduct in relation to this application, including his persistence in the application after it became clear that it could not succeed, I am persuaded that the facts justify the granting of a costs order as between attorney and client. It would be just to ensure more efficiently that the respondent is not left out of pocket in respect of the expenses incurred as a result of the first applicant's conduct⁸.

[21] I grant the following order:

The application for leave to appeal is dismissed with costs, including the costs reserved on 6 October 2022.

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

APPEARANCES

DATE OF HEARING	: 24 February 2023
DATE OF JUDGMENT	: 28 February 2023
FIRST APPLICANT'S COUNSEL	: Adv M. Khumalo
FIRST APPLICANT'S ATTORNEYS	: Mphambo Michelle Attorneys
RESPONDENT'S COUNSEL	: Adv R. Blumenthal

⁸ Nel v Waterberg Landbouwers Ko-operatiewe Vereeniging 1946 AS 597 at 607

RESPONDENT'S ATTORNEYS

: Brittan Law Attorneys