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

Case No:54023/2021

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

8 February 2024

In the matter between:

SHOWROOM CENTRE (PTY) LTD	1st Applicant
SIYATHEMBANA PROJECT MANAGEMENT & DEVELOPMENT (PTY) LTD	2nd Applicant
STEPHEN ZAGEY	3rd Applicant

And

RONALD KAGAN	Respondent

JUDGMENT

NOKO J

Introduction

[1] The applicants launched an application for leave to appeal the judgment and order I granted in the above matter in terms of which the application for costs order and upliftment of the bar were dismissed.

Background

[2] The applicants launched an application to stay the proceedings (*application to stay*) instituted by the respondent on the basis that there were legal costs outstanding from previous applications which the respondent withdrew and failed to offer payment for legal costs or refused to settle same. At the time of the application the respondent had served notice of bar and applicant then, simultaneous with the application to stay, served the application to uplift the bar.

[3] At the time when the application to stay was launched there were other bills which were not taxed but the respondent proceeded to pay the said legal costs for the matter to be proceeded with. The applicants could not persuade the respondent to uplift the bar and tender costs after the payment and as such had to continue with the application to stay for the purposes of obtaining an order for costs and also for the upliftment of the bar.

[4] The applicants contend that the prospects of the success with the appeal are good and the case may be precedent setting as the rules currently do not make a clear provision of the process to follow after serving the application to stay. Further that since

the respondent capitulated (and settled the legal costs) after the stay application was launched, I could still have made an order for them to pay the costs. The applicants further contended that I erred in dealing with the application to stay and upliftment of the bar disjunctively and as such I should not have separately considered whether the requirements for the upliftment of the bar were met without regard being paid to the application to stay.

[5] The respondent contended that the applicants failed to make out a case for the stay of the proceedings and it follows that the relief for costs (which was discretionary) would not have been granted. In addition, the risk of the applicants' submission that the uplifting of the bar was dependent on the stay application was suicidal as the relief for the stay was aborted. In any event failure to address *in extenso* the requirements for the upliftment of the bar derailed the wherewithal for the applicants to be granted the relief.

Legal analysis

[6] In the application for leave to appeal the applicant relies on section 17 of the Superior Court Act which provides that leave to appeal would be granted where the court is, *inter alia,* of the opinion that the appeal would have a reasonable prospect of success and further that the adjudication of the application to stay would be precedent setting.

[7] It has been held by several courts[1] (and therefore accepted) that the provisions section 17 have introduced a higher threshold to be met in application for leave to appeal

[1] *Mont Chevaux Trust v Tina Goosen & 18 Others* 2014 JDR 2325. *MEC for Health, Eastern Cape v Mkhitha* 2016 ZASCA (25 November 2016), *Acting National Director of Public Prosecutions and Others v Democratic Alliance: In Re Democratic Alliance v Acting Director of Public Prosecutions and Others* 2016 ZAGPPHC 489.

and the usage of the word '*would*' require the applicants to demonstrate that another court would certainly come to a different conclusion.

[8] The mere possibility of success, an arguable case or one that is not hopeless is not enough.[2] There must be a sound, rational basis to conclude that there is a reasonable prospect of success on appeal[3].

[9] The issue of the adjudication of the application to stay is no longer alive as the applicant did not and could not persist therewith since the respondent has paid the amount which was claimed even though it was not due because it was not taxed. The challenges which allegedly beset the application to stay proceedings due to a lacuna in the rules regarding application to stay would be adjudicated on another day as the relief for the stay cannot and cannot be persisted with.

[10] The requirements for the upliftment of the bar have still not been complied with and even if they were dependent of the application for a stay of proceedings, now that the applicants no longer persist with the application for stay the prospects of success for the upliftment of the bar became even more precarious. The applicant still harbour a belief that it was not necessary to address the defences in the application for the upliftment of the bar which application was ancillary.[4] At same time applicants contend that the defences were raised by the respondent in his answering affidavit and was then not required to raise them in the founding affidavit. The applicants now contends that the respondent '*…did not capture the defences correctly*'.[5] This argument was intended

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2 *MEC for Health, Eastern Cape v Mkhitha* 2016 ZASCA (25 November 2016) at para 17
3 *S v Smith* 2012 (1) SACR 527.
4 See para 23 of the Applicants' Heads of Argument at 094-33.
5 Ibid at para 25 on p094-37.

to justify introducing the defences in the reply and it is now self-destructive as it is a concession indirectly that the correct defence were only raised in the reply.

[11] In conclusion the applicants have therefore failed to meet the threshold and as such this court is not persuaded that another court would come to a different conclusion. To this end the application for leave to appeal is bound to fail.

Costs

[12] There are no reasons presented to unsettle the general principle that the costs should follow the results.

Order

[13] In the premises I grant the following order:

That the application for leave to appeal is dismissed with costs.

Mokate Victor Noko
Judge of the High Court

This judgement was prepared and authored by Noko J is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be 8 **February 2024.**

Date of hearing: 07 February 2024
Date of judgment: 08 February 2024

Appearances

For the Applicants:	Adv W Strobl
Attorneys for the Applicants:	Andrew Garrat Incorporated.
For the Respondent:	Adv M Scheepers
Attorneys for the Respondent	EFG Incorporated