

REPUBLIC OF SOUTH AFRICA



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

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

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B.C. WANLESS
March 2024

DATE: 11

CASE NUMBER: 2023-008709

In the matter between:

FATMOLS LODGES PROPRIETARY LIMITED

Applicant

and

JEAN BOTHA

First Respondent

REGISTRAR OF DEEDS

Second Respondent

STANDARD BANK OF SA LTD

Third 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 11 March 2024.

JUDGMENT (LEAVE TO APPEAL)

WANLESS J

Introduction

[1] In this application the Applicant, namely Fatmols Lodges Proprietary Limited (*“the Applicant”*) seeks leave to appeal, either to the Supreme Court of Appeal (*“SCA”*) or the Full Court of this Division, against the judgment and order of this Court granted on 19 December 2023. The application is opposed by the First Respondent, namely Jean Botha, adult female (*“the First Respondent”*).

[2] The correct principles of law to be applied in such an application in terms of section 17 of the *Superior Court Act 10 of 2013* (*“the Act”*) are trite. This brief judgment (as necessitated by the very nature of the application itself) will not be burdened unnecessarily by setting out same and referring to the authorities dealing therewith.. Leave to appeal should only be granted if this Court is satisfied that an appeal court would (not could) come to a different finding than it did in its judgment and would grant a different order.

Grounds of appeal

[3] These grounds are set out in the Applicant’s *“Application for Leave to Appeal”*.

Once again, in order not to burden this judgment unnecessarily, those grounds will not be set out herein. To do so would serve little or no purpose.

[4] The Applicant has adopted a *“belt and braces”* approach in this application for leave to appeal in that the Applicant seeks to impugn the judgment and order of this Court in every material respect. In doing so, not only does the Applicant simply repeat the same arguments which were placed before this Court when this Court heard the matter as an Opposed Motion in the Applicant’s *“Application for Leave to Appeal”* but

the *identical* arguments were also contained in the Applicant's Heads of Argument which were, in turn, recited virtually *verbatim by the Applicant's* attorney, Mr Mukwani, when the application for leave to appeal was argued before this Court.

[5] In the premises, the Applicant takes issue with the judgment of this Court on the basis that, *inter alia*, this Court incorrectly found that:

5.1 the Applicant had failed to set out sufficient facts to establish the oral agreement relied upon as the basis for its cause of action in its Founding Affidavit. In this regard, this Court held that since the Applicant had failed to do so in its Founding Affidavit it was impermissible for the Applicant to attempt to do so in its Replying Affidavit. Importantly, this Court held that even if this was incorrect the Applicant had failed to set out sufficient facts in reply to support its case that the oral agreement relied upon had been entered into between the parties;

5.2 there was a genuine or *bona fide* dispute of fact on the application papers before this Court pertaining to the existence of this alleged oral agreement;

5.3 material contradictions existed in the Applicant's Founding Affidavit;

5.4 the Applicant's Founding Affidavit is devoid of any facts to support a case that the First Respondent is getting rid of funds or is likely to do so with the intention of defeating claims of creditors. This is an essential requirement of an anti-

dissipation interdict which is the relief that the Applicant ultimately sought in the application;

5.5 the Applicant had failed to make out even a *prima facie* case as to why it was entitled to the relief sought. In this regard this Court found that not only had the Applicant failed to satisfy this requirement but it had also failed to satisfy the remaining requirements in respect of an interim interdict; and

5.6 the Applicant should pay the costs of the application on the scale of attorney and client.

Discussion

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[6] The fundamental flaw in this application by the Applicant for leave to appeal is that:

6.1 the Applicant does not (and cannot) dispute the factual findings made by this Court. In this regard, apart from the material dispute of fact in respect of the alleged oral agreement, the facts of the matter are (as set out in the judgment of this Court), largely common cause;

6.2 the Applicant does not dispute the correctness of the principles of law found to be applicable by this Court and as dealt with in its judgment; and

6.3 the Applicant accepts that the relief that it seeks is in the form of an anti-dissipation interdict.

[7] In light of the foregoing, it is difficult to understand on what basis the Applicant in this matter seeks to convince this Court that another court would come to a different finding. The only possible manner in which the Applicant could do so would be to illustrate to this Court that this Court has incorrectly applied the principles of law to the accepted facts. This the Applicant has failed to do. Rather, as set out above, the argument put forward on behalf of the Applicant in this application for leave to appeal is simply a repeat of the argument placed before this Court when the matter was first argued. To compound the difficulties facing the Applicant in the present application, in light of the very nature of the proceedings (application proceedings) and the nature of the relief sought by the Applicant (an anti-dissipation interdict which is *sui generis* but shares the essential requirements of an interim interdict), in order to be successful in the application for leave to appeal it would have been necessary for this Court to have erred or misdirected itself in a material respect, in relation to each and every one of the many requirements it was necessary for the Applicant to satisfy in the main application. Put differently, this Court need only find that another court would not come to a different finding in respect of only one of the findings made in its judgment, in order to come to the conclusion that this application for leave to appeal should be dismissed.

[8] With regard to the issue of costs the same considerations must apply. Neither the facts upon which this Court based its finding that the Applicant should pay the costs of the application on a punitive scale nor the principles of law applied by this Court when deciding to do so, were seriously challenged by the Applicant in the present application for leave to appeal. Further, whilst the Applicant's attorney did bring certain authorities to this Court's attention dealing with, *inter alia*, various factors which may

be taken into consideration by a court when awarding costs on an attorney and client scale, the Applicant could not dispute the overriding fact that a court has a general discretion, which must obviously be exercised judicially, when deciding the issue of costs. This Court dealt extensively in its judgment with the reasons as to why, in its discretion, the Applicant should be ordered to pay the costs of the application on a punitive scale. It is highly improbable that a court of appeal would interfere with the manner in which this Court exercised that discretion and come to a different finding in respect of the scale of those costs.

Conclusion

[8] As already dealt with in this judgment, faced with the insurmountable difficulties catalogued herein, the Applicant has failed to show that another court would come to a different finding and that this Court should grant the Applicant leave to appeal against the whole of the judgment delivered on the 19th of December 2023, including the award made by this Court in respect of costs. In the premises, this application for leave to appeal must be dismissed.

[9] This Court may also add that in making such an order it further bears in mind the oft repeated narrative of the courts of appeal that the court *a quo* should be slow to grant applications for leave to appeal in matters where the prospects of success are not good. This avoids the unnecessary burdening of the rolls of the appeal courts.

[10] As to the issue of costs, there are no unusual circumstances pertaining to this matter that would cause this Court, in the exercise of its general discretion pertaining to the

issue of costs, to deviate from the trite principle that costs should normally follow the result. In the premises, the Applicant should be ordered to pay the costs of the application for leave to appeal.

[11] Regarding the scale of those costs, Counsel for the First Respondent submitted (as was included in the First Respondent's Heads of Argument) that a similar order for costs, as was made by this Court in respect of the main application, should follow in the present application. In other words, it was submitted that the Applicant should pay the costs of this application on the scale of attorney and client. As set out above, this Court dealt extensively with the reasons why, in its discretion, it elected to make the award in respect of costs in the main application on the higher scale. This judgment will not be burdened unnecessarily by repeating those reasons. Suffice it to say, this Court finds that those reasons are, to a large degree, equally applicable to the present application. Arising therefrom and in the exercise of this Court's general discretion in respect of the issue of costs, it is the opinion of this Court that the Applicant should, once again, pay the costs on a punitive scale.

[12] Lastly, this Court wishes to record that during the course of argument before this Court, Mr Mukwani, who appeared for the Applicant, formally withdrew the comments made in the Applicant's Application for Leave to Appeal, pertaining to, *inter alia*, the time taken by this Court to deliver its judgment and the competence of this Court in reaching the decision that it did. This Court understands that these comments were withdrawn by the Applicant's attorney on the basis that not only were they irrelevant to the application for leave to appeal but also, were based on incorrect facts and/or a failure to properly understand certain norms and standards. This Court is grateful to

Mr Mukwani for withdrawing the aforesaid comments and apologising to this Court therefor.

Order

[13] This Court makes the following order:

1. The application for leave to appeal is dismissed.
2. The Applicant is ordered to pay the costs of this application on the scale of attorney and client.

**B.C. WANLESS
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION
JOHANNESBURG**

Heard: 14 February 2024

Judgment: 11 March 2024

Appearances

For the Applicant: Mr. T. Mukwani (Attorney)
Instructed by: T. Mukwani Attorneys

For the First Respondent: Adv. P. Van Niekerk
Instructed by: Phillip Silver Mathura Inc.