**REPUBLIC OF SOUTH AFRICA**

**IN THE HIGH COURT OF SOUTH AFRICA**

**GAUTENG DIVISION, PRETORIA**

CASE NO: **28220/2015 and 28221/2015**

**DELETE WHICHEVER IS NOT APPLICABLE**

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

In the matter between:

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|---|---|
| **LUVHOMBA LEGAL EDGE CC** | First Applicant |
| **MATTHEWS TUWANI MULAUDZI** | Second Applicant |
| **MULAUDZI & ASSOCIATES CC** | Third Applicant |
| **GERENDRA CC** | Fourth Applicant |
| **LUVHOMBA LEGAL CARE CC** | Fifth Applicant |
| **LUVHOMBA COMMUNICATIONS & INFO CC** | Sixth Applicant |
| **MZANTSI RESTAURANT CC** | Seventh Applicant |
| **LEGAE LE MONATE RESTAURANT CC** | Eight Applicant |
| **LUVHOMBA PROJECTS AND CONSTRUCTION CC** | Ninth Applicant |
| **LUVHOMBA SECURITY SERVICES AND PATROL CC** | Tenth Applicant |
| **LUVHOMBA LEGAL AXE CC** | Eleventh Applicant |

**LUVHOMBA FINANCIAL SERVICES CC** Twelfth Applicant
And

**NEDBANK LIMITED** Respondent

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**JUDGMENT ON LEAVE TO APPEAL**

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**GRENFELL AJ**

[1] **INTRODUCTION**

1.1. The applicants, or solely the second applicant ("Mr Mulaudzi"), being the unsuccessful applicants in a rescission application, seek to appeal the order granted on 7 September 2017 dismissing the rescission application with costs. The party who authorised the launch of these proceedings is dealt with hereinafter.

1.2. This application has taken an inordinate period of time to be heard and decided, due to both administrative failings and the failure of Mr Mulaudzi, who was acting in person, to actively pursue the application. Upon my being advised that the matter was uploaded to Caselines and ready to be heard, a date was allocated without delay for the hearing of the application for leave to appeal.

1.3. The fact that nearly five years have passed, from the date of the order granted in 2017 and the postponed application for leave to appeal being heard by me, by video-conference, is lamentable. The application was first set down on 4 July 2022, when, having heard argument and in terms of a substantive application for the relief sought, the matter was postponed at the behest of the

applicants' recently appointed attorney of record, Mabuza Attorneys, represented by Ms Mafisa who argued the postponement application, to allow said attorneys time to prepare for the application and to make any such amendments as they saw fit to the notice for leave to appeal and heads of argument previously delivered in 2021, by 11 July 2022, as set out in the postponement order. The hearing was postponed until 25 July 2022 with costs being reserved. Notwithstanding the inordinate delay, the leave the appeal was timeously sought, as appears from a stamp on the notice of application for leave to appeal. At the hearing, the applicants or Mr Mulaudzi were represented by Ms Modise briefed by Mabuza Attorneys.

1.4. Mr Kilian, who appeared for Nedbank in the application, drew my attention to the fact that Nedbank's attorneys had caused a Rule 7 Notice, challenging the attorneys' authority to act for the close corporations, (which are in liquidation), to be served on Mabuza Attorneys on 4 July 2022, but that the notice had not been responded to. Ms Modise for the applicants conceded there had been no response. I directed that argument on all issues should proceed to avoid a piecemeal determination.

1.5. It bears noting that an attorney held a watching brief for the trustees of the close corporation applicants, and the submission by Mr Killian, was that the trustees had not authorised these proceedings and the insolvent estates of the close corporation entities should not be burdened with the costs of this application, if unsuccessful.

1.6. The fact that no response was received to the Rule 7 notice delivered by Nedbank, is in my view no bar to the matter being heard. The authority of attorneys to act is contained in the notice of appointment as attorneys of record dated 29 June 2022. In terms of that appointment, the attorneys stated they were acting for the applicants, with no distinction drawn between them. As no authority from the trustees of the insolvent close corporations was delivered by Mabuza attorneys, it follows that the attorneys can only act for Mr Mulaudzi. This is confirmed in the affidavit in support of the postponement, where Mr Mulaudzi states under oath on 2 July 2022 that he acts for himself as a shareholder and member of the close corporations.

1.7. That Mr Mulaudzi's estate has been sequestrated, does not in my view, disentitle him from being heard in this application, in light of the reversionary interest that he has in both his and the close corporations affairs. That is not to say that Mr Mulaudzi is, absent establishing special circumstances, able to represent the close corporations against the wishes of the trustees. That the Supreme Court of Appeal previously allowed Mr Mulaudi to be heard in another appeal matter is no authority for a blanket entitlement to do so in other matters. There was nothing to preclude Mr Mulaudzi from seeking to establish "special circumstances" that would enable him to be heard for the corporate entities. This he has again failed to do, after a five year window of opportunity and despite being legally represented.

1.8. In light of the view that I take of the matter on its merits, it is unnecessary for me, mero moto, to attempt to chisel from the papers, special circumstances for Mr Mulaudzi and I will assume, in his favour that he was entitled to have

his legal representatives make his points for him at the hearing of the application for leave to appeal.

1.9. Nedbank has made the point, repeatedly, that no order in the trial before Basson J was sought by Nedbank against Mr Mulaudzi personally and that that remains the position. However, the costs of this application, including those reserved on 4 July 2022 are sought by Nedbank against Mr Mulaudzi personally, de bonis propriis, not in the punitive sense of the maxim, but rather to reflect the factual position that Mr Mulaudzi is the party who has sought to appeal the 2017 order.

1.10. This application for leave to appeal by Mr Mulaudzi, is a unique dual crafted attack on the trial judgment of Basson J in favour of Nedbank. The appeal against that judgment, which was handed down after a trial, has exhausted all available legal twists and turns, of leave to appeal being refused by the court a quo, leave being sought in the Supreme Court of Appeal on petition twice and the Constitutional Court finally refusing leave. That road having ground to a halt, Mr Mulaudzi seeks a second bite at the cherry by pursuing this appeal on the self-same grounds. I am not at all convinced that such a hybrid procedure is competent, and no authorities were suggested to me in support thereof. To recognise two concurrent different procedural attempts at appeal is obviously undesirable, but in light of the view that I take on the merits of the matter, this is also not a matter on which I need express a firm view.

[2] **THE APPLICATION FOR LEAVE TO APPEAL**

2.1. Twelve grounds of appeal were contained in the notice of application for leave to appeal. No additional grounds were introduced by 11 July 2022 or at all, and Ms Modise at the hearing, confirmed that the matter would be argued on the grounds and heads of argument of Mr Mulaudzi, already uploaded to Caselines.

2.2. Ms Modise, in her submissions, helpfully contended that the core complaint was that Mr Mulaudzi was not heard before the order dismissing the rescission application was handed down. The right to be heard forms the crux of the complaint. Mr Kilian reiterated in his submissions, that the close corporations act precluded Mr Mulaudzi from being heard and that there was no application for special circumstances, either then or now. Ms Modise referred me in argument to paragraphs 11, 12 and 15 of the replying affidavit by Mr Mulaudzi, which indicated there was animosity between him and the trustees appointed to the close corporations insolvent estates. I shall assume in Mr Mulaudzi's favour that these constituted special circumstances, even though raised in reply, and that it cannot be said that he has no reasonable prospects of success in that regard on appeal. That is not the end of the matter. Ms Modise in response to a query by the court during argument, agreed that the failure to be heard, without more, was an insufficient basis to grant leave to appeal. The prospects of success of obtaining a rescission of the trial judgment is required before leave to appeal can be granted.

2.3. The true enquiry can thus be stated as being: whether there are prospects of success on appeal, of Mr Mulaudzi being able to convince an appeal court that he has shown good cause for rescission. First, there was no default at all, as Mr Mulaudzi appeared at the trial and was present throughout proceedings. Secondly, and utterly devastating to the appeal now sought, is that no defence to the trial action has been set out in a manner which creates a triable issue. In the founding affidavit, which is where the case must be made out, all Mr Mulaudzi states is that there is a bona fide defence. Such an ipse dixit fails to meet the test in assessing same. This is not remedied in reply, by a bald statement of a counterclaim for millions of rand in a rounded off amount. Mr Mulaudzi both personally and when legally represented, fails to address the judgment referencing Nedbank's standard banking loan agreements and suretyships. These are the facts to which the test for leave to appeal must be applied.

[3] **THE TEST FOR LEAVE TO APPEAL**

3.1. It is a precondition to the granting of leave to appeal, that the court is of the opinion, that either, the appeal would have a reasonable prospect of success or that there is some other compelling reason why the appeal should be heard.

3.2. The wording of section 17(1) of the Superior Courts Act 10 of 2013 provides:

> *"Leave to appeal may only be given where the judge or judges concerned are of the opinion that –*

*(a)(i) The appeal would have reasonable prospects of success; or*

*(ii) There is some other compelling reason why the appeal should be heard including conflicting judgments on the matter under consideration;*

*(b) The decision sought on appeal does not fall within the ambit of section 16(2)(a) and (c). Where the appeal sought to be appealed does not dispose of all the issues of the case the appeal would lead to a just and prompt resolution of the real issues between the parties."*

3.3. The wording of the rule was amended by virtue of the inclusion of the word *"would"* in section 17(1)(a)(i) thereof. As a precursor to the granting of leave to appeal, same should be seen as a more stringent requirement of reasonable prospects of success on appeal, as opposed to another court coming to a different conclusion. I now consider whether the applicants have reasonable prospects of success on appeal.

[4] **GROUNDS OF APPEAL**

4.1. The twelve grounds of appeal can be concertinaed into three facets, namely:

4.1.1. Mr Mulaudzi's locus standi and right to be heard;

4.1.2. A constitutional challenge to section 150(3) of the insolvency act; and

4.1.3. Accepting Nedbank's "version" and rejecting that of Mr Mulaudzi.

4.2. In considering the grounds, I have to decide the matter on admissible evidence and authority. Mr Mulaudzi has caused numerous case authorities in other matters in which he has been involved to be uploaded to Caselines and I have not had regard to any of such judgments and statements, as they are irrelevant to the issue to be decided.

4.3. Assuming, as I have done above, that a case on appeal could be made out for the right to be heard, Mr Mulaudzi is utterly unable to obtain relief as he has made out no case for rescission of the trial judgment. I am unable to form the opinion that another court could find no wilful default and a bona fide defence on the rescission application papers.

4.4. I am also unable to find that there is some other compelling reason why the appeal should be heard. The constitutional point challenging the validity of a section of the insolvency act, was not properly raised by Mr Mulaudzi and was not addressed by either party during argument. Neither the constitutional point, nor the novel attempt to use both appeal and rescission by Mr Mulaudzi is a matter to engage the attention of the Supreme Court of Appeal, which is where it was suggested, in argument, that the appeal should be sent.

4.5. I find that the application for leave to appeal was launched and pursued by Mr Mulaudzi alone and as the application has been unsuccessful, it is proper that he should pay the costs thereof, including costs reserved on 4 July 2022.

4.6. I decline to order de bonis propriis costs, both because Mr Mulaudzi acted throughout in his personal capacity and because no notice was given therefore in Nedbank's heads of argument.

[5] **CONCLUSION**

5.1. Having failed to satisfy the test for leave to appeal the application falls to be dismissed.

5.2. As Mr Mulaudzi brought the application and has a residual interest in the matters that affect his insolvent estate, he should pay the costs of the unsuccessful application.

[6] **ORDER**

I grant the following order:

1 The application for leave to appeal the order of 7 September 2017 is dismissed;

2 The costs of the application for leave to appeal, including the costs reserved on 4 July 2022 are to be paid by Mr Mulaudzi.

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**Grenfell AJ**

Appearances

For Mr Mulaudzi : Adv Modise

Instructed by: Mabuza Attorneys

For the respondent: Adv Kilian

Instructed by: Baloyi Swart and Associated Incorporated

Date of hearing : 25 July 2022 by video-conference and Date of judgment: 29 July 2022 - deemed date by email and uploading onto CaseLines