



CASE NO: 53330/2019

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

16 November 2023

In the matter between:

CHATZ CELLULAR (PTY) LTD

Applicant

and

CELLUAR CORPORATE SUITE (PTY) LTD

Respondent

JUDGMENT

NOKO J*Introduction*

[1] This is an application for leave to appeal the order and judgment I made on 25 August 2023 for an order compelling the applicant to serve and file heads of arguments, , practice note and list of authorities (*Heads of argument*). The Practice directive 2 of 2020 required that a party who has filed heads may launch application to compel the opponent who failed to serve heads to do so before the parties approach the registrar to apply for hearing date.

Background

[2] There were three interlocutory applications pending between the parties. The respondent served and filed its heads and proceeded to apply to court for an order to compel the respondent to file and serve heads of arguments.

[3] The respondent launched an application to compel on 28 February 2023 which was enrolled on the unopposed roll of 15 March 2023. The applicant served notice of intention to oppose the application on 7 March 2023.

[4] The applicant requested the respondent to remove the matter from the unopposed roll since the application became opposed. In retort the respondent stated that since the applicant has not served the opposing affidavit the Directives decrees that under those circumstances the application should remain enrolled and will be argued on the unopposed motion court.

[5] The matter served before me on 15 March 2023 and an application to compel was accordingly granted as the applicant did not file answering papers. The applicant having failed to advance cogent reasons why the heads of arguments could not be served. The decision I made was predicated on the Directive which states that where no answering papers are served the application to compel would proceed on the unopposed basis.

[6] Ordinarily the applicant as the *dominus litis* should be a party keen at ensuring that the *lis* launched is prosecuted to finality. But in this instance, it was instead the respondent who compelled the applicant to serve and file heads of arguments and strangely the applicant wanted to oppose filing of heads of arguments. Interestingly the applicant found it in its own reflection that there is no need to provide the court with just a hint as to the reasons why it refuses to serve heads of arguments.

[7] The application for leave to appeal is based on several grounds which need not be detailed in this judgment. In view of the conclusion, I arrived at it is not necessary to traverse each of them.

[8] The respondent has raised a point *in limine* and contends that at the time when the application to compel served before me there was a Directive¹ in terms of which heads of arguments was supposed to be served and filed by both parties before the registrar is approached for a date for hearing.

[9] The position has now changed, and it is no longer a requirement in terms of the new Directive² for both litigants to serve and file the heads before obtaining a date for

¹ Directive 2 of 2020.

² Directive dated 17 August 2023.

hearing. To this end the respondent had in fact before the hearing of the application for leave to appeal obtained a date for hearing even though the applicant had still not served and filed heads of arguments.³ The applicant now advances the excuse that there are no heads of argument and joint practice note whilst it is the very same applicant which objected or opposed being compelled to serve and file heads of arguments. This stance displays a dilatory approach for some purpose which is not apparent but must be frowned upon.

[10] That notwithstanding the applicant harbour a belief that parties are still required to serve and file heads of argument and the August 2023 Directive which changed the position cannot override the 2022 Directive as the latter was issued by the Judge President whereas the former was issued by the Deputy Judge President.

[11] The respondent correctly contended that on proper consideration of section 17(1)(b)⁴ read with section 16(2)(a)⁵ of the Superior Court Act the application for leave to appeal should be dismissed. The test is whether the order being sought will have a practical effect or result. It is correct that if the applicant succeeds on appeal the outcome would be to allow the applicant to approach the court *a quo* to argue why the applicant should not be compelled to serve and file heads of argument. This is no longer required and will not be pursued by the respondent and will therefore be an academic

³ The applicant is aware of the set down and has stated in para 25 of the Heads of Argument that “[T]he Court in the matter enrolled for the 30th of October 2023 does not have the benefit of either plaintiff’s heads of argument and a joint practice note following a pre-hearing meeting.”

⁴ Section 17(1) provides as follows:

Leave to Appeal may only be given where the judge or judges concerned are of the opinion that

- (a) ...
- (b) the decision sought on appeal does not fall within the ambit of section 16(2)(a); and
- (c) ...

⁵ Section 16(2) provides as follows:

- (i) When at the hearing of an appeal the issues are of such a nature that the decision sought will have no practical effect or result, the appeal may be dismissed on this ground alone.
- (ii) Save under exceptional circumstances, the question whether the decision would have no practical effect or result is to be determined without reference to any consideration of costs.

exercise. The horse has bolted, and the application was set down without the heads and the respondent would not insist on compelling the applicant to serve heads as it is no longer a requirement.

[12] The principles underpinning the essence of section 16(2)(i) have been crystallised in the following judgments which also relates to section 21A. It was held in *Darmell Properties 282 CC v Renasa Insurance Co Ltd and Others NNO*⁶ where the court had regard to the provisions of section 21A, the predecessors of section 16 of the Superior Court Act that “[I]t would amount to an academic exercise without practical effect if *Dormell* were to be granted the order it seeks. It would immediately have to repay the full amount to *Renasa* or *Synthesis*. Such an order would, at best, cause additional cost and inconvenience to the parties without any practical effect. In terms of section 21A of the *Supreme Court Act 59 of 1959* the court must exercise its discretion against *Dormell*.⁷

[13] The similar sentiments are located in *National Coalition for Gay and Lesbian Equality & others v Minister of Home Affairs & others*⁸ at paragraph [21] where the Constitutional Court echoed what the learned Chief Justice had stated before that “[A] case is moot and therefore not justiciable if it no longer presents an existing or live controversy which should exist if the court is to avoid giving advisory opinions on abstract propositions of law.”

⁶ 2011(1) SA 70 (SCA) at para 45.

⁷ See also in *Port Elizabeth Municipality v Smit* 2002 (4) SA 241 (SCA) at para 7 where it stated that: ‘It can be argued, I think, that s 21A is premised upon the existence of an issue subsisting between the parties to the litigation which requires to be decided. According to this argument s 21A would only afford this Court a discretion not to entertain an appeal when there is still a subsisting issue or lis between the parties the resolution of which, for some or other reason, has become academic or hypothetical. When there is no longer any issue between the parties, for instance because all issues that formerly existed were resolved by agreement, there is no “appeal” that this Court has any discretion or power to deal with.’

⁸ 2000 (2) SA 1 (CC)

[14] In conclusion the appeal would not end up in an outcome which has no practical effect and therefore this application falls to be dismissed.⁹

[15] Notwithstanding the foregoing the applicant has also failed to demonstrate that the impugned order is dispositive of all issues in the appeal¹⁰ and further that there are exceptional circumstances as contemplated in section 16(2)(ii) of the Superior Court Act.

Costs

[16] The costs should follow the result.

Conclusion

[17] I grant the following order:

The application for leave to appeal is dismissed with costs.

Mokate Victor Noko
Judge of the High Court

Delivered: This judgement was prepared and authored by the Judge whose name is reflected and 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 16 November 2023.

⁹ *City Capital SA Property Holdings Ltd v Chavonnes Badenhorst St Clair Cooper* 2018 (4) SA 71 (SCA), para 44.

¹⁰ As contemplated in section 17(1)(c) of the Act.

Appearances.

Counsel for the Applicant

Adv GW Alberts SC
Adv L Hennop

Instructed by:

Nols Nolte Attorneys

Counsel for the Respondent:

Adv U Van Niekerk

Instructed by

Alan Allschwang & Associates Inc,
c/o Jacobson and Levy Inc

Date of hearing:

25 October 2023

Date of Judgment:

16 November 2023.