HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO: 11789/19

(1) REPORTABLE: NO.

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED.

DATE: 24th FEBRUARY 2023

SIGNATURE

In the matter between:

PLAATJIE MAHLOBOGOANE First Applicant

MODIRWADI MAVIS MAHLOBOGOANE Second Applicant

And

WILLOW ACRES ESTATE HOMEOWNERS ASSOCIATION NPC Respondent

J U D G M E N T

APPLICATION FOR LEAVE TO APPEAL – APPLICATION FOR RESCISSION

VERMEULEN AJ

[1] By way of an order of the above Honourable Court dated the 6th of April 2022, an application for the sequestration of the First- and Second Applicants' estates launched by the Respondent, and an application for rescission of a deed of settlement and consent court order which was launched by the First- and Second Applicants against the Respondent, were consolidated to be heard by me on the opposed Motion Court roll.

[2] Pursuant to the above order the two separate applications, both opposed, came before me for determination.

[3] The First- and Second Applicants' application for rescission was dismissed with costs and the Respondent's application for the sequestration of the First- and Second Applicants' estates was upheld and a provisional order for sequestration was issued for the estates of the First- and Second Applicants.

[4] Pursuant to the aforementioned two orders the First- and Second Applicants launched an application for leave to appeal. This application for leave to appeal was directed against both the provisional order for sequestration as well as in respect of the dismissal of their application for rescission.

[5] For the purpose of the application for leave to appeal the First- and Second Applicants filed an initial application for leave to appeal on or about the 1st of November 2022 and subsequently thereto filed a supplementary application for leave to appeal on or about the 29th of November 2022.

[6] In the applications for leave to appeal, the First- and Second Applicants raised various grounds for leave to appeal against both the provisional order for sequestration and in respect of the dismissal of the application for rescission.

[7] The application for leave to appeal was originally set down for the 25th of January 2023 in open Court. On that day Mr Ellis who appeared on behalf of the Respondent raised a point ***in limine*** in that the First- and Second Applicants' application for leave to appeal against the provisional order for sequestration was bad in law in view of the provisions of Section 150(1) read with Section 150(5) of the Insolvency Act, Act 24 of 1936.

[8] After the point ***in limine*** was duly debated with both parties the point in limine was upheld and the application for leave to appeal insofar as it was directed to the provisional order for the sequestration of the First- and Second Applicants' estate was dismissed with costs. This was not the end of the application for leave to appeal as the First – and Second Applicant could still ask leave to appeal against the dismissal of the application for rescission.

[9] Due to time constraints the parties could not on the 25th of January 2023 proceed to present arguments in respect of the Applicants' application for leave to appeal directed against the dismissal of their application for rescission. For this purpose the application for leave to appeal was again set down for hearing for Wednesday, the 22nd of February 2023.

[10] On this day Mr Lesomo again appeared on behalf of the First- and Second Applicants and Mr Ellis appeared on behalf of the Respondent.

[11] In view of the fact that the First- and Second Applicants' aforementioned application for leave to appeal incorporated grounds directed against both the provisional order for sequestration and against the dismissal of the application for rescission, I enquired from Mr Lesomo at the start of the hearing that he must indicate to me upon which grounds in the said notices do the Applicants intend to rely for purposes of the present application for leave to appeal that served before me today.

[12] In reply to my request, Mr Lesomo did not wish to identify grounds in the notice for leave to appeal upon which the Applicants intend to rely, but advised that he wished to adopt a different approach. I allowed Mr Lesomo to continue in order to determine what his approach was.

[13] Mr Lesomo commenced with my written judgement and evaluated each paragraph from the beginning and made submissions in respect of the content thereof with what he did not agree with.

[14] By way of example Mr Lesomo with reference to paragraphs 10 and 11 of my judgement, took issue with the Court's reference to the matter of ***Natal Joint Municipality Pension Fund v Ndumeni*** [1] and the court's refence to the interpretation principles to be applied to the written Deed of Settlement that was entered into between the parties which Deed of Settlement was referred to in paragraph 9 of the judgement.

---

[1] ***2012(4) SA 593 SCA***

[15] In this respect Mr Lesomo submitted that although he did not dispute the principle of interpretation as enunciated by the aforementioned case, the issue of interpretation was never an issue between any of the parties nor raised by any of the parties during the argument of the matter and that there was no basis for the court to raise this aspect. I enquired from Mr Lesomo whether it was his submission that the Court was prohibited to refer to any other authorities than the authorities referred to between the parties during argument. Mr Lesomo submitted that the Court was not prohibited but that in the present matter interpretation was not an issue between the parties.

[16] Although I will deal with this aspect in more detail below, the interpretation issue now raised does not form part of any of the grounds as contained in the Applicants' application for leave to appeal. In any event there is no substance in this submission by Mr Lesomo. The reference to the ***Natal Joint Municipality*** matter is reference by the Court on how the written Deed of Settlement that was entered into between the parties should be properly interpreted, as the content of the said deed of settlement was material to the outcome of the application of rescission.

[17] The next issue that was raised by Mr Lesomo and in respect of which Mr Lesomo spent most of his argument related to the issue of "*compromise*" which was raised by the Court from paragraph 12 of its judgement. In this regard I understood Mr Lesomo's argument to be ***inter alia*** the following:

[17.1] With the reference to Christie in paragraph 12 of the judgement, Christie refers that a compromise could only be reached between parties if there is a underlying "*dispute*" between the parties. If there is no dispute there can be no compromise;

[17.2] Mr Lesomo submitted that at the time when the parties entered into the written Deed of Settlement as referred to in paragraph 9 of the judgement, there was no underlying dispute between the parties. In the premises where the Court thus proceeded to find that there was indeed a dispute that was compromised between the parties the Court have erred.

[17.3] Mr Lesomo further argued that the Applicants were ambushed during the hearing of the application for rescission in respect of the issue of compromise which was raised by the Court ***mero motu***. Mr Lesomo argued that he did not have an opportunity to properly consider the ***Elmarie Slabbert v The Member of the Executive Council for Health and Social Development of Gauteng Provincial Government*** [2] judgement as referred to in paragraph 14 of the judgement in the Court.

[18] Before I evaluate whether these submissions have any merit, it is again necessary to reiterate that these issues were raised during argument do not form part of any of the grounds for leave to appeal in their application for leave to appeal. I specifically raised this with Mr Lesomo and enquired from him on which one of his grounds of appeal he relied for the issues that he was now raising. Mr

[2] ***Unreported judgement Case no. 432/2016***

Lesomo conceded that it does not form part of any of the grounds of the Applicants' applications for leave to appeal, but in view of the fact that it is questions of law that there was an obligation upon the Court to take cognisance of these grounds.

[19] When I enquired from Mr Lesomo whether it was not necessary that the grounds for the Applicants' application for leave to appeal should appear within their notice of application for leave to appeal he did not agree. I directed Mr Lesomo's attention to a passage quoted from Erasmus, Superior Court Practice in his discussion of the Uniform Rules of Court in Volume 2 on p. RS18, 22, D1 – 663 where the learned author in his discussion of Rule 49(1)(b) ***inter alia*** stated as follows:

> "*The grounds of appeal must be clearly and succinctly set out in clear and unambiguous terms so as to enable the court and respondent to be fully informed of the case the applicant seeks to make out and which the respondent is to meet in opposing the application for leave to appeal. The sub-rule is peremptory in this regard* …"

[20] In response Mr Lesomo argued that this was not authority as this was a mere passage by an author, in the Erasmus work aforementioned. When I referred Mr Lesomo to the matter of ***Songono v Minister of Law & Order***[3] Mr Lesomo requested an opportunity to read the judgement. I granted Mr Lesomo's such an opportunity.

---

[3] ***1996 (4) SA 384 (E) and more in particular from p. 385 to 386***

[21] In reply to the ***Songono v Minister of Law & Order*** matter, Mr Lesomo's submitted that the said case did not prohibit a party to introduce something that constitutes a point of law that is not contained in his application for leave to appeal.

[22] I do not agree. This is not litigation by way of ambush. I agree with the judgement of Leach in the **Songono** case supra. The rules are not only for the convenience of the Court but for the parties as well. A party must know which case he has to meet in Court. I agree with Leach J:

> "*Accordingly, insofar as rule 49(3) is concerned, it has been held that grounds of appeal are bad if they are so widely expressed that it leaves the appellant free to canvass every finding of fact and every ruling of law made by the court a quo, or if they specified the findings or fact or rulings of law appealed against so vaguely as to be of no value either to the court or to the respondent, or if they, in general, fail to specify clearly and in unambiguous terms exactly what case the respondent must be prepared to meet – see, for example, Harvey v Brown 1964 (3) SA 381 (E) at 383; Kilian v Geregsbode, Uitenhage 1980 (1) SA 808 (A) at 815 and Erasmus Superior Court Practice B1 – 356 – 367 and the various authorities there cited.*
>
> *It seems to me that, by a parity of reasoning, the grounds of appeal required under rule 49(1)(b) must similarly be clearly and succinctly*

set out in clear and unambiguous terms so as to enable the court and the respondent to be fully and properly informed of the case which the applicant seeks to make out and which the respondent is to meet in opposing the application for leave to appeal. Just as rule 49(3) is peremptory in that regard, rule 49(1)(b) must also be regarded as being peremptory."

[23] In the present matter the position for the Applicants were much worse than in the ***Songono*** matter where the grounds were indeed mentioned in the application for leave to appeal but were not formulated clearly, succinctly or unambiguously. In the present matter the grounds upon which they relied during argument were either not specified in the application for leave to appeal at all or the court's attention was not drawn to such a ground. . Although the court at least on three occasions enquired from Mr Losomo with which ground of appeal he was dealing with, Mr Lesomo not once directed the court's attention to a single ground of appeal. The court had to browse through various pages of the notices of appeal in an attempt to fit a ground of appeal with the submissions made by Mr Lesomo in court. In my view this should be sufficient to dismiss the application for leave to appeal should for this reason alone.

[24] Even if I was incorrect with the aforementioned I am in any event of the opinion that there is no merit in the aforementioned grounds:

[24.1] In ***Fischer and Another v Ramahlele and Others***[4] ***the Supreme Court of Appeal*** inter alia held:

"There may also be instances where the court may mero motu raise a question of law that emerges fully from the evidence and is necessary for the decision of the case."

[24.2] In the present matter the deed of settlement that was made a consent order was fully dealt with in evidence by the parties in their papers and formed the subject of the application for rescission;

[24.3] During argument the representatives of both parties were directed to the issues of "*compromise*", *"consent order*" and the judgement of the Supreme Court of Appeal in the ***Elmarie Slabbert v The Member of the Executive Council for Health and Social Development of Gauteng Provincial Government*** [5] matter and the applicability and effect thereof to the facts in the application for rescission that served before the court.

[24.4] At no stage during argument did Mr Lesomo object to these issues that were raised by the court, at no stage did he require an opportunity to stand down to properly consider his position in respect of these issues or for an opportunity to properly read the **Elmarie Slabbert** judgement. On the contrary, Mr Ellis is quite correct that during argument Mr Lesomo stated

---

[4] *2014 (4) SA 614 (SCA) at para [13]- [14]*

[5] ***Unreported judgement case no. 432/2016 delivered on the 3rd of October 2016 by Her Ladyship the honourable Acting Appellate Justice Potterill (with whom Mpati, Petse, Willis and Dambuza concurred);***

that he would read the judgement whilst Mr Ellis were busy with submissions in opposition to the application..

[24.5] It is evident from the content of the Deed of Settlement itself (as quoted in paragraph 9 of the judgement) that there were clear disputes between the parties that were compromised. Mr Ellis appearing for the Respondent correctly referred me to the content of paragraph 6 of the Deed of Settlement that reads as follows:

"*Upon conclusion of all obligations by the First and Second Respondents, this Settlement Agreement is in full and final settlement of all disputes between the parties*."

[25] Mr Lesomo in addition submitted that I was clearly biased in that I did not deal with three authorities which he referred to in his heads of argument in my judgement. There is also no merit in this submission. In paragraph 24 of the judgement I clearly referred to the arguments which were raised and relied upon by Mr Lesomo in the Court ***a quo***. In paragraph 27 of the judgement I specifically stated that as a result of the view that the court adopted on the counter-application it was not necessary to deal with submissions by the Respondent. I persist with this attitude.

[26] Lastly Mr Lesomo again argued that there was no just cause for the parties to agree upon the amount of R110 000.00 in the Deed of Settlement. As I understood Mr Lesomo's submissions the said amount was made up by the various charges and fees complaint about by the Applicants in their founding

papers and that if I had regard to the three cases referred to in their Heads of Argument I would have had to consider if there was just cause in agreeing to pay the R110 000.00 in the Deed of Settlement.

[27] I do not agree with these submissions.

[28] In the Deed of Settlement that was entered into between the parties in July 2019 the parties agreed in paragraph 3.1 as follows:

> "*The First and Second Respondents will affect payment to the Applicant in the amount of R110 000.00 on or before Friday 24 May 2019*."

[29] There is nothing unlawful and/or illegal in respect of an undertaking to pay an amount of R110 000.00 to another party. It may have been that the underlying agreement that gave rise to the Deed of Settlement included payment of illegal or unlawful charges but that does not appear from a mere reading of the Deed of Settlement. I again reiterate what the learned author Christie said[6]:

> "*Unlike novation, a compromise is binding on the parties even though the original contract was invalid or even illegal, unless the compromise partakes of the Deed of Settlement "partakes of the mischief of the original contract.*"

[30] In order for the Court to have been in the position to establish whether the Deed of Settlement "*partakes of the mischief of the original underlying contract*" the onus was surely upon the Applicants to make out a case in their founding papers

---

[6] ***The Law of Contract 5th edition in his discussion of compromise from p. 455;***

that the amount of R110 000.00 included alleged illegal charges, illegal fees etc. This they did not do. As I have already indicated in paragraph 26 of my judgement when I enquired from Mr Lesomo who appeared on behalf of the Applicants whether he can indicate me whether any of the legal charges complaint about as a matter of fact form part of the R110 000.00 he advised me that he could not but that the Court should make a reasonable inference to that effect. On the contrary he used the words that the R110 000.00 might or may include all of the said charges.

[31] In addition I could not find any allegation in the founding papers in the application for rescission stating that as a fact that the R110 000.00 as contained in the Deed of Settlement contained any of the charges or fees complaint about. On the contrary the deponent to the founding papers states in paragraph 5.3 that he does not know how the amount was arrived at.

[32] I agree with Mr Ellis that no case was made out by the Applicants that the Deed of Settlement should be rescinded premised upon ***justus error,*** on the basis of mutual mistake between the parties. It is evident that the mistake complained about by the First- and Second Applicants is a unilateral mistake and not a common mistake between the parties. It is further apparent that at no time was any allegation of misrepresentation made the First- and Second Applicants against the Respondent.

[33] In order for the Applicants to succeed with an application for leave to appeal, the application has to fulfil the requirements prescribed in Section 17(1)(a)(i) of the Superior Courts Act, 10 of 2013 which reads as follows:

> "*17. Leave to appeal:*
>
> *(i) Leave to appeal may only be given where the judge or judges concerned are of the opinion that: -*
>
> *(a) (i) the appeal would have a reasonable prospect of success ….*"

[34] With the promulgation of Section 17(1) of the Superior Courts Act, the legislator has introduced a statutory jurisdictional requirement for applications for leave to appeal.

[35] Leave to appeal may accordingly only be given, when the appeal ***would*** have reasonable prospects of success.

[36] In the ***The Mont Chevaux Trust (IT 2012/28) v Tina Goosen***[7] the Land Claims Court (in obiter dictum) held that the wording of this subsection raised the bar of the test that now has to be applied to the merits of the proposed appeal before leave should be granted.

---

[7] ***Unreported, LCC case no. LCC14R/2014 dated 3 November 2014, cited with approval by the Full Court in the Acting National Director of Public Prosecutions v Democratic Alliance (unreported, GP case no. 19577/09 dated 24th of June 2016) at par. 25; Pretoria Society of Advocates v Nthai 2020 (1) SA 267 (LP) at par. 5; Johannesburg Society of Advocates v Nthai 2021 (2) SA 343 (SCA);***

[37] In ***Notshokovu v S***[8] it was held by the Supreme of Appeal that an appellant now faces a higher and stringent threshold, in terms of the Superior Courts Act (and in particular this subsection) compared to the provisions of the Repealed Supreme Courts Act 59 of 1959.

[38] In the present matter I am not satisfied that the appeal would have a reasonable prospect of success.

[39] In the premises I make the following order:

[39.1] The First and Second Applicants' application for leave to appeal in respect of the application for rescission of judgement is dismissed;

[39.2] The First and Second Applicants are ordered to pay the Respondent's costs.

_____

P J VERMEULEN

Acting Judge of the High Court

Gauteng Division, Pretoria

Date of Hearing: 21st February 2023

Judgment delivered: 24th February 2023

[8] ***Unreported judgement, SCA Case no. 157/15 dated 7th of September 2016;***