



**IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG DIVISION, PRETORIA**

CASE NO: 29145/2021

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

9 June 2023

DATE

In the matter between:

STEPHANUS RUTHVEN

FIRST APPLICANT

STEPHANUS RUTHVEN N.O.

SECOND APPLICANT

And

ANJA BOTHA

FIRST RESPONDENT

JOEY BOTHA

SECOND RESPONDENT

SAREL JOHANNES PETRUS ROUX N.O.

THIRD RESPONDENT

JUDGMENT

Coram NOKO AJ

Introduction

[1] The applicant brought an application for leave to appeal the order and judgment I made on 8 March 2023 in terms of which I reviewed and set aside the three resolutions taken by the second applicant. The resolutions were as follows, first, the resolution withdrawing the case pending in the Mpumalanga High Court (*Mpumalanga Court*) under case number 4390/18 (*pending matter*). Secondly, a resolution terminating the mandate given to the respondents' attorneys of record in the said pending matter and thirdly, a resolution terminating the Botha Ruthven Family Will Trust (*Trust*).

Background

[2] The leave to appeal seeks to challenge the basis upon which I decided to review and set aside the decision of the second applicant and further having ordered his removal as a trustee. The second respondent was also ordered to pay legal costs on attorney and client scale *de bonis propriis*.

[3] At the hearing of the application on 14 February 2023, I was invited to determine whether the reasons advanced by the second applicant in taking the resolutions were predicated on sound legal basis. One of the reasons stated by the second respondent for his decision was that he was misled in agreeing to launch the court action in the Mpumalanga Court on behalf of the Trust. Having heard the arguments and read the papers I concluded that the second applicant was not misled at the time the decision to commence civil proceedings in Mpumalanga Court was taken. More critical to my

decision was the fact that the second applicant averred that he was initially reluctant to agree to the commencement of the legal action but subsequently agreed after he was assured that he will not be personally liable for legal costs. The other reason for my decision was on the basis that regard had to the brief background of the matter the basis of the *lis* in Mpumalanga court had good prospect of success. The litigation being about sale and registration of transfer of the immovable property which could have been transferred to the trust. The sale indirectly benefitted the second applicant to the exclusion of other beneficiaries. Lastly, I further decided that the second applicant should be removed as a trustee as his conduct was against the interest of the Trust and or beneficiaries.

At the hearing.

[4] The applicants' counsel contended at the hearing of the application for leave to appeal that I erred in deciding the issue which was pending before the Mpumalanga court. This issue being the question whether or not the second applicant was misled into agreeing to launch civil proceedings in the Mpumalanga court. The respondents' counsel on the other hand argued that there was no bar for me to adjudicate and make a decision as I was seized with the said issue.

[5] It appears to me that the argument raised by the applicants appears to what in general terms would have come before me as a point in limine of *lis pendens*¹ which was not raised before me at the initial hearing by either the applicants' or the respondent's

¹ The requirements for this defence are that the litigation should be between the same parties, the cause of action should be the same and the same relief should be sought in both proceedings. Despite such requirements being met the court still retains the discretion whether or not to uphold such a defence depending on what is just and equitable having regard to the balance of convenience. See *Ferreira v Minister of Safety and Security and Another* (1696/2011) [2015] ZANHC 14 at para [8].

legal representatives. This would have been unique since the applicant would not raise a defence in a case where it is in court as a *dominus litis*. The applicants acquiesced in the jurisdiction of this court by remaining silent. In fact the applicants' counsel stated again in the heads of argument submitted in the application for leave to appeal that the "... *termination of the Trust was motivated by... him having been misled as to the rationale behind the intended litigation*".² If the intention was for this court not to interrogate the veracity or the basis of the reasons behind the decision taken by the second applicant to make resolutions on the basis that the issue is pending before another court then it was equally premature and incorrect for the second applicant to premise a resolution on the issue which is still pending before another court. It appears to have been an attempt to pre-empt the outcome of the case.

[6] The second applicant further contended that another reason for the decision by the second applicant to take the said resolutions was because the prospects of success of the litigation in Mpumalanga court are poor more particularly because the transaction which was the subject matter of that litigation took place over a period of 10 years ago. This argument still relates to the pending litigation in Mpumalanga Court and it appears that the applicants are just prevaricating and now find it convenient for the court to consider the prospects of the matter which is still pending before the Mpumalanga Court. On being questioned by the court as to why this should be considered as it is also an issue pending in another court the applicants' counsel contended that this court is seized with issue and should decide thereon because the respondents did not deem it fit to request that it must be struck out. The applicants are clearly approbating and reprobating.

² See para 5.1 of the Second Applicants' Heads of Argument on Caselines 25-32

[7] In any event the status of the matter in Mpumalanga court is in limbo since its revival depends on the determination of the validity of the resolutions. If the basis of the reasoning which underpinned the resolutions cannot be considered then that is the makes the end of the matter in Mpumalanga Court. The fact that the parties agreed to stay the implementation of the resolution does not *ipso facto* means the litigation in Mpumalanga is alive or that any of the parties can act in that matter.

[8] The applicants failed to persuade this court that the registration of the transfer of immovable property is irreversible after the lapse of a period of 10 years. The legal position is simply that if the transfer of an immovable property took place on the basis of an unlawful contract such registration would not be deemed effective despite the registration of the transfer.³ Besides, it is trite that the rights relating to immovable properties prescribes after 30 years.⁴

[9] A further argument advanced by the applicants is that the resolutions were informed by the view that the Trust had no assets to defray possible legal costs which may ensue having regards to the poor prospects of the *lis* in Mpumalanga court and further that the contention that the immovable property `being contingent assets' offers no refuge as it is dependant on the success of the litigation in Mpumalanga. The respondents' counsel argued, rightly so, that the second applicant was given assurance that the indemnity which was given by the late Stephanus Botha still obtained and was confirmed by the surviving spouse. In addition, contingent asset remains an asset of the Trust. I am not persuaded that the decision I reached is found wanting first because there is no basis for the applicants to find the indemnity for the possible legal costs to be

³ South African property regime is predicated on the abstract theory of transfer in terms of which the validity of the transfer of ownership is not dependent upon the validity of the underlying transaction but that there should be valid *causa*.

⁴ Section 11 of Prescription Act 68 of 1969.

assailable and secondly the basis for the argument that the prospects of success are poor is baseless.

[10] The applicants have contended further that the indemnity granted only applies to him in his personal capacity. Ordinarily the cost order, if any, would be against the Trust and the trustee will not be liable unless the Trustee is found to be blameworthy in which case such an order can be enforced against personally. In this instance if for some reason the cost order needs to be enforced against second applicant then he would have recourse and invoke the indemnity granted to him. This argument is therefore unsustainable.

[11] The applicants' counsel further contended that I had regard to irrelevant facts to come to the conclusion as I did and this influenced me incorrectly to decide to remove the second applicant as a Trustee. The only consideration, so went the argument, should have related to the adoption of the resolutions and not removal of the second applicant as a trustee. Further that the removal of a Trustee should also not be taken lightly and it is only in circumscribed instances where a trustee should be removed. Reference was made of the judgment in *Haitas v Froneman A.O.*⁵ where the court cautioned that the power to remove trustee should be exercised with circumspection more particularly as the deceased has made a choice as to who should be a trustee and as such interference with the wishes of the dead should not lightly be effected. The applicants' counsel further submitted that if the second respondent's view ultimately found to be correct in the Mpumalanga court this court would have removed the second applicant for no good reason and will not be able to reverse the removal. This reasoning fails to appreciate the fact that the second respondent's position is that the Trust should be terminated and the

⁵ Unreported judgment of *Haitas v Froneman and Others* (1158/2019) [2021] ZASCA 01 (06 January 2021).

question would be why would he still wish to remain the Trustee in a trust which according to him deserves of no extra day. It also follows that if even Mpumalanga court may find against the Trust the second applicant may then be able to confirm that he is vindicated and notwithstanding any other parties' view he may opt not to appeal the judgment.

[12] The second applicant gave evidence against the interest of the Trust (and the beneficiaries) and his conduct cannot be considered as being the administration in the interest of the trust and/or its beneficiaries bearing in mind that the subject matter of the Mpumalanga case is for the benefit of the Trust. If anything, the conduct of the second respondent was aimed at imperilling the assets of the Trust. To this end the order that the second applicant bears the costs *de bonis propriis* is warranted.

[13] The counsel for the respondents further submitted that the termination of the Trust on the basis that it has no asset should have been the very reason why the applicants should not have entered the terrain to litigate in the name of the Trust. It is not possible decipher the *raison d'tre* for the second applicant to have allowed the first and second respondents to take over the business of Trust and not to be hell bend at insisting on representing the Trust in a case which, as he argued, is not winnable, having testified against the said case and further his view being that the Trust has no funds to litigate.

[14] Section 17 of the Superior Court's Act provides thus

(1) 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; 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 to appeal does not fall within the ambit of section 16(2)(a); and*

(c) *where the decision sought to be appealed does not dispose of all the issues in the case, the appeal would lead to a just and prompt resolution of the real issues between the parties.*

[15] The test to be applied by a court in considering an application for leave to appeal as stated by Bertelsmann J in *The Mont Chevaux Trust v Tina Goosen & 18 Others* 2014 JDR 2325 (LCC) at para 6 that ‘*It is clear that the threshold for granting leave to appeal against a judgment of a High Court has been raised in the new Act. The former test whether leave to appeal should be granted was a reasonable prospect that another court might come to a different conclusion. The use of the word “would” in the new statute indicates a measure of certainty that another court will differ from the court whose judgment is sought to be appealed against*’.

[16] ‘In order to succeed, therefore, the applicant must convince this Court on proper grounds that he has prospects of success on appeal and that those prospects are not remote, but have a realistic chance of succeeding. More is required to be established than that there is a mere possibility of success, that the case is arguable on appeal or that the case cannot be categorised as hopeless. There must, in other word, be a sound, rational basis for the conclusion that there are prospects of success on appeal.’⁶

⁶ *S v Smith* 2012 (1) SACR 567 (SCA) at para 7.

[17] On the basis of the what is set out above read together with reasons detailed in my judgment I am not persuaded that another court would come to a different conclusion. I therefore conclude that the application is bound to fail. The applicants' conduct amount to the abuse of the court process and unreasonably put into motion the court proceeding to frustrate the finalisation of the matter in Mpumalanga court in the name of the very Trust he contends has no funds or a good case. The court should ordinarily frown at such conduct.

[18] In consequence I order as follows:

1. The application for leave to appeal is dismissed.
2. The second applicant respondent is ordered to pay legal costs on attorney and client scale, *de bonis propriis*.

NOKO MV
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

APPEARANCES

Counsel for the Applicants : Adv Oukamp
Attorneys for the Applicants : Darryl Furman & Ass.

Counsel for the first and second respondents : De Koning SC
Attorneys for the respondents : Gerhard Botha & Partners

Date of hearing : 25 April 2023
Date of judgment : 9 June 2023