



**HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

CASE NO: 14130/2020

(1) REPORTABLE: NO.
(2) OF INTEREST TO OTHER JUDGES:
NO
(3) REVISED.
DATE: 27 JUNE 2023

SIGNATURE

In the matter between:

**WELBEPLAN BOERDERY (PTY) LTD
GERHARD NIEUWOUDT OLIVIER**

First Applicant
Second Applicant

and

**KAAP AGRI BEDRYF LTD
ARBITRATOR**

First Respondent
Second Respondent

In re: in the matter between

In the matter between:

KAAP AGRI BEDRYF LTD

Applicant

and

**WELBEPLAN BOERDERY (PTY) LTD
GERHARD NIEUWOUDT OLIVIER
ARBITRATOR**

First Respondent
Second Respondent
Third Respondent

J U D G M E N T: APPLICATION FOR LEAVE TO APPEAL

This matter has been heard virtually and is otherwise disposed of in terms of the Directives of the Judge President of this Division. The judgment and order are accordingly published and distributed electronically.

VERMEULEN AJ

- [1] This is an application for leave to appeal to the Full Bench of the above Honourable Court *alternatively* the Supreme Court of Appeal in terms of Section 17(1)(a) of the Superior Courts Act, Act no. 10 of 2013, against the whole of the judgment and order handed down by myself on the 17th of February 2023.
- [2] For the ease of reference I will refer to the parties as they were referred to in the main application and as was referred to in my judgment handed down on the 17th February 2023. In the premises I will refer to the First and Second Applicants in the present application as Welbeplan Boerdery and Olivier respectively and to the First Respondent as Kaap Agri.
- [3] In respect of the main judgment and order I ordered:
- [3.1] That the application for postponement that served before me be dismissed and that Welbeplan Boerdery and Olivier be ordered to pay the costs of the application for postponement;
- [3.2] That the counter-application that was launched by Welbeplan Boerdery and Olivier be dismissed and they be ordered to pay the costs of the counter-application;
- [3.3] That the award made by the Arbitrator, in the arbitration proceedings between Kaap Agri and Welbeplan Boerdery and Olivier, a copy that was attached as Annexure "D" to the Founding Affidavit in the main application, be made an order of Court and that Welbeplan Boerdery and Olivier be ordered to pay the costs of the main application.
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[4] It was against these orders that Welbeplan Boerdery and Olivier filed the present application for leave to appeal.

[5] I need to mention that the application for leave to appeal was already filed on the 2nd of February 2023.

[6] It is evident from the Notice of application for leave to appeal that at the time the said notice was filed and served, Welbeplan Boerdery and Olivier were represented by Dyason Inc.¹

[7] Although Welbeplan Boerdery and Mr Olivier noted the present application for leave to appeal and although they are *dominus litis* in the present application, when the application for leave to appeal came before me this morning, there was no appearance on behalf of either Welbeplan Boerdery or Mr Olivier.

[8] Mr van der Merwe who appeared on behalf of Kaap Agri submitted that it did not come as any surprise that there was no appearance, and directed my attention to the following:

[8.1] On the 9th of February 2023 (a mere 7 days after the Notice of application for leave to appeal was filed and served) Welbeplan Boerdery and Olivier's attorneys who represented them at that stage, Messrs Dyason Inc., filed a Notice of Withdrawal as attorneys of record;²

[8.2] In the Notice of Withdrawal Dyason Inc. indicated that Welbeplan Boerdery and Mr Olivier's last known address is:

*"Vezi & De Beer Inc.
319 Alpine Way
Lynnwood
Pretoria"*

[8.3] Rule 16(4)(b) in this regard provides as follows:

"16(4)(b) The party formerly represented must within 10 days after the notice of withdrawal notify the Registrar and all other parties of a new address for service as contemplated in sub-rule (sic) – 2, whereafter all subsequent

¹ See: Notice of application for leave to appeal, Case line, p. 26 – 6;

² See: Notice of Withdrawal as attorneys of record, Case line, p. 27 – 1 to 27 – 3;

documents in the proceedings for service on such party shall be served on such party in accordance with the rules relating to service: ...”

- [8.4] Sub-rule 16(4)(b) as it currently is framed compels the party formerly represented by an attorney to notify the Registrar and all other parties of a new address for service as contemplated in sub-rule (2). This must be done within 10 (ten) court days after delivery of the Notice of Withdrawal by the attorney who cease to act on behalf of such a party.
- [8.5] Neither Welbeplan Boerdery nor Olivier advised Kaap Agri or the Registrar of their new address as provided for in this rule.
- [8.6] Notwithstanding the above, Mr van der Merwe assured me that yesterday, the 26th of June 2023, Kaap Agri's attorneys of record made contact with Messrs Vezi De Beer, a firm of attorneys who's address also serves as the registered address of Welbeplan Boerdery and who at previous times in the past also served as the address of service for Olivier. Messrs Vezi De Beer was advised of the hearing of the application for leave to appeal today.
- [8.7] In addition an email was also sent by Kaap Agri's attorneys to the last known email address of Olivier, advising him of the hearing of the application for leave to appeal today, 27th June 2023. These emails addressed to Messrs Vezi De Beer and Mr Olivier were uploaded onto case lines.
- [8.8] Mr van der Merwe further advised that subsequent to the main judgment and order which was handed down by me in February 2023, Kaap Agri proceeded and procured a final order for the winding-up of Welbeplan Boerdery, which final order was given by my brother Acting Justice Van den Boogert in the above Honourable Court. Mr van der Merwe advised that although an application for leave to appeal was noted against such an order by Welbeplan Boerdery, the said application for leave to appeal was dismissed by Acting Justice Van den Boogert and that no subsequent application for leave to appeal to the Supreme Court of Appeal was noted.

- [8.9] As a consequence of the final winding-up of Welbeplan, joint liquidators were appointed. Mr Van Der Merwe advised that Kaap Agri's attorneys procured a letter that was sent on behalf of the joint liquidators who confirmed that they were aware of the date for the hearing of the application for leave to appeal today but they will abide by the Court's decision and that there would be no appearance on Welbeplan's (now in liquidation) behalf.
- [9] Having regard to the history of this matter as was duly dealt with in the judgment in the main application, I am by no means surprised by the non-appearance on behalf of Olivier today and by the lack of action taken on his behalf to obtain finality in the hearing of the application. As I have duly indicated in my judgment in the main application, at the time when the main application came before me Welbeplan Boerdery and Olivier have already been represented by at least 16 different sets of attorneys. The *modus operandi* of Welbeplan Boerdery and Olivier was to appoint new attorneys when it suited their purposes but prior to the hearing of the matter to terminate their mandate as was evident in the *modus operandi* used in the present application for leave to appeal as well.
- [10] I am also advised by Ms Sekete, the Registrar of the Court who made the necessary arrangements for the hearing of this application for leave to appeal, that subsequent to the noting of the leave to appeal on the 2nd of February 2023, she did not receive any correspondence from Welbeplan Boerdery or Mr Olivier or any enquiries as to a date for the hearing of the present application for leave to appeal. It is apparent that although Welbeplan Boerdery and Mr Olivier are *dominus litis* in respect of the present application no steps were taken by them to procure the hearing of this application. This is borne out by the fact that it was Kaap Agri's attorneys who made the necessary arrangements for the hearing of the application for leave to appeal.
- [11] I am satisfied to proceed with the matter in the absence of Olivier today. As I have indicated in the main judgment, this is not an isolated incident where either Welbeplan

or Olivier would be unrepresented on the date of the hearing of a matter in the chain of litigation between the parties to date.

[12] The test whether to grant leave to appeal is provided by the provisions of Section 17(1)(a) of the Superior Court Act 10 of 2013 (the Act). The section provides as follows:

“17(1)(a) Leave to appeal may only be given where the judge or judges concerned are of the opinion that:

- (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 judgment on the matter under consideration ...”

[13] It is trite that with the coming into operation of the Act, the relevant test has been amended in that the word “*would*” is used in determining the conclusion to which the Judge or Judges must come before leave to appeal can be granted. It has been held that the amended wording of this sub-section raised the bar of the test that now has to be applied to the merits of the proposed appeal before leave should be granted.³

[14] In *Notshokovu v S*⁴ it was held that an appellant faces a higher and stringent threshold in terms of the Act and this sub-section, compared to the provisions of the repealed Supreme Court Act 59 of 1959.

[15] In respect of the second portion of the test, it is submitted that each application for leave to appeal must be decided on its own facts and that there is not an exhaustive list of criteria.⁵

[16] In the matter of *TWK Agriculture Holdings (Pty) Ltd v Hoogveld Boerderybeleggings (Pty) Ltd and Others*⁶ the Supreme Court of Appeal went to strike an appeal from the roll even though special leave to appeal was granted by the same Court. It did so on the basis that:

³ *The Mont Chevaux Trust (IT 2012/28) v Tina Goosen*, unreported, LCC Case No. LCC14R/2014 dated 3 November 2014, cited with approval by the Full Court in “*The Acting National Director of Public Prosecution v Democratic Alliance* (unreported) GP Case no. 19577/09 dated 24 June 2016) at par. 25;

⁴ unreported, SCA Case no. 157/15 dated 7 September 2016 at par. [2];

⁵ *Transnet Durban (Pty) Ltd v eThekweni Municipality*, unreported KZD case no. D4178/2020 dated 8 February 2021 at par. [13];

⁶ (2023)ZASCA 63 (5 May 2023)

“the fact that leave to appeal has been granted upon application to the President of this Court is not decisive of whether a case meets the criteria for special leave. It still remains for us to consider whether we should entertain the appeal at all”.
and that:

“ the orders made by the Full Court do not meet the requirements of appealability to this court. As a result despite special leave having been granted by two judges of this court the appeal is not properly before this court and the appeal must be struck from the roll.”

[17] The consequence of the aforementioned is that the presiding Judge hearing an application for leave to appeal has a duty to ensure that the application for leave to appeal complies with the requirements of Section 17(1)(a) of the Superior Courts Act prior to granting leave. Such a presiding Judge must be diligent in analysing whether the applicants for leave to appeal comply with the individual requirements of Section 17(1)(a). It is not for the mere asking.

[18] I am satisfied that in the present application for leave to appeal the appeal would not have a reasonable prospect of success as contemplated in terms of Section 17(1)(a) of the Superior Court Act and in addition that there is no other compelling reason why the appeal should be heard. In the premises the application should be dismissed.

[19] In respect of costs the following:

[19.1] In ***Public Protector v South African Reserve Bank***⁷ the majority of the Constitutional Court, with reference to ***Orr v Schoeman***⁸ stated at 318 C – 319 A as follows:

“More than 100 years ago, Innes CJ stated the principles that cost on an attorney and client scale are awarded when a court wishes to mark its disapproval of the conduct of a litigant. Since then this principle has been endorsed and applied in a long line of cases and remains applicable. Over the years, courts have awarded costs on an attorney and client scale to mark their disapproval of fraudulent, dishonest or mala fides (bad faith) conduct, vexatious conduct, and conduct that amounts to an abuse of the process of court.”

⁷ 2019 (6) SA 253 (CC);

⁸ 1907 TS281

[19.2] In the present matter the Court is of the opinion that there was no merits whatsoever in the application for leave to appeal and that it is clear that the said application was merely an attempt to delay Kaap Agri from executing upon its valid judgment.

[19.3] In this sense the conduct of Welbeplan Boerdery and Olivier in bringing the application for leave to appeal amounts to an abuse of the process of the Court.

[19.4] The Courts have awarded costs against a losing party on an attorney and client basis where a defence was raised that was dishonest and only for the purposes of gaining time.⁹

[19.5] It has even been held that an abuse of the process of Court may form the basis of an award of costs on an attorney and client scale, although the intent may not have been such.¹⁰

[19.6] I am satisfied that the actions of Welbeplan Boerdery and Olivier in bringing the present application for leave to appeal justify an order of costs on a penalising scale. It is clear that the present application for leave to appeal constitutes an abuse of the process of the Court and was merely a step taken to delay finality in the proceedings. This is borne out by the Olivier's non-compliance with Rule 16(4)(b), Olivier's lack of interest in having the present application finalised and Olivier's non-appearance today.

[19.7] Although it is praiseworthy of the joint liquidators to abide by the decision of the court today, it does not absolve them of their obligation to pay costs. Welbeplan is a co-applicant today before me. If the liquidators

⁹ *SASS v Berman* 1946 WLD 138; *Wool Textiles Manufactures v Goldberg* 1952 (4) SA 116 (W);

¹⁰ *See: In re: Alovial Creek Ltd* 1929 CPD 532; *Lemore v African Mutual Credit Association* 1961 (1) SA 195 (C); *Marsh v Odendaalrus Cold Storages Ltd* 1963 (2) SA 263 (W) at 270; *Phase Electric Company (Pty) Ltd v Zimmans Electrical Sales (Pty) Ltd* 1973 (3) SA 914 (W);

wanted to avoid any order as to costs they should have withdrawn the application for leave to appeal on behalf of Welbeplan (now in liquidation) post their appointment or at the very least at that time have advised Kaap Agri and the court of their decision to abide. This they did not do.

[20] In the premises the following order is made:

1. The application for leave to appeal is dismissed;
2. The Applicants in the application for leave to appeal (First and Second Respondents in the main application) are ordered to pay the costs on a scale as between attorney and client, jointly and severally, the one to pay the other to be absolved.


P J VERMEULEN

Appearances

**Counsel appearing on behalf of Applicants
in application for leave to appeal:
Attorney for Applicant:**

No Appearance

No Attorneys on record

**Counsel appearing on behalf of 1ST Respondent:
in application for leave to appeal:
Attorney for respondents:**

Adv. MP Van Der Merwe SC

Kellerman Joubert Incorporated.

Date of Hearing:

27th June 2023

Judgment delivered:

27th June 2023