IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

Case Number: 019229/2022

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

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E.M. KUBUSHI **DATE: 08 March 2024**

MAHORI, GLADWELL TSAKANE	First Appellant
MULEA: CONSTANCE MASHUDU	Second Appellant
and	
FIRSTRAND BANK LTD	First Respondent
THE SHERIFF OF THE HIGH COURT, TEMBISA	Second Respondent
MOKOSINYANE, ALFRED	Third Respondent
NEW AFRICA GATEWAY CHURCH	Fourth Respondent
THE REGISTRAR OF DEEDS, PRETORIA	Fifth Respondent
MOKOSINYANE, VIOLET	Sixth Respondent

***Delivered**: This judgment 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 e-mail and by uploading it to the electronic file of this matter on Caselines The date and for hand-down is deemed to be 08 March 2024.*

JUDGMENT: LEAVE TO APPEAL

KUBUSHI, J

[1] The application for leave to appeal emanates from an application launched by the Applicants in the Court *a quo*, based on Part A and Part B. The relief sought under Part A was, in the main, for the deregistration of the mortgage bond which the Bank had registered over the Applicants' property allegedly in contravention of Uniform Rule 49(11), together with other ancillary relieves. Part B of the application dealt with alleged transgressions by the First Respondent of sections 3(e)(iii) and 127(5)(a) and (b) of the National Credit Act ("the NCA").[1] There were further claims laid against the First Respondent and in some instances against Mr Gomes (an employee of the First Respondent) for contempt of court, fraud and to be barred from making any claim regarding any indebtedness from the Applicants, premised on the *par delictum* rule.
At the hearing of the application the Applicants abandoned Part A of the application and proceeded only with Part B, thereof.

[2] The application was dismissed on the following reasoning:

2.1 That the gist of section 3(e)(iii) of the NCA deals with the purpose of the NCA and does not provide for any offence which it can be said the conduct complained of by the Applicants, constitutes such an offence.

2.2 That the Applicants are completely wrong in their reading and understanding of the provisions of section 127 of the NCA as the Applicants never surrendered their property to the First Respondent.

2.3 That this Court is not a criminal court and does not have the jurisdiction to find the First Respondent guilty of any offence.

[1] Act 34 of 2005.

2.4 That the property, in question, was registered back in the names of the Applicants, and as such the question of contempt of court cannot be considered.

2.5 That on a reading of the papers, and applying the *Plascon Evans* rule, the allegations of fraud as to the outstanding balance are without any basis.

2.6 That the *par delictum* rule does not apply as the First Respondent has not contravened any of the criminal offences cited by the Applicants.

[3] The Applicants' application for leave to appeal is contained in an eighty-eight-page document titled *'Application for Leave to Appeal to the Supreme Court of Appeal'*. Of these pages, forty-four pages are what purports to be the Applicants' grounds for leave to appeal, and forty-four pages consist of annexures. This document also doubles up as the Applicants' Heads of Argument.

[4] The application for leave to appeal is opposed by the First Respondent on the grounds that the application does not comply with the provisions of Rule 49(1) of the Uniform Rules of Court ("Rule 49(1)") and section 17(1) of the Superior Courts Act ("the Superior Courts Act").[2] From the reasons set out hereunder, the First Respondent's argument that the application for leave to appeal does not comply with the provisions of Rule 49(1) and section 17(1) of the Superior Courts Act, is correct.

[2] Act 10 of 2013.

Non-compliance with Rule 49(1)

[5] In terms of Rule 49(1), the grounds of appeal must be clearly and succinctly set out in clear and unambiguous terms to enable the court and the 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.[3]

[6] In this application, the grounds of appeal, if any, have not been clearly and succinctly set out. From the reading of the application for leave to appeal, it is not clearly discernable what the Applicants' complaint is, or what are their grounds of appeal. The Applicants took the Court *a quo's* judgment and 'dissected' same to nit-pick anything that is not acceptable to them without advancing any cogent and convincing grounds as to why the Court *a quo* could have found otherwise. Moreover, from this voluminous application, the Applicants seem to be rehashing arguments already made by the Applicants when the main application was heard.

[7] Rule 49(1) is peremptory.[4] In *Xayimpi*,[5] an application for leave to appeal was dismissed due to the non-compliance with this subrule. The applicants simply having attached an affidavit of some 45 pages instead of setting out the grounds of appeal clearly and succinctly. Similarly, in this application, the lengthy and rambling application for leave to appeal filed, falls woefully short of what is required in terms of Rule 49(1).

[3] Songomo v Minister of Law and Order 1996 (4) SA 384 (E) at 385I – J.
[4] Songomo v Minister of Law and Order 1996 (4) SA 384 (E) at 385J – 386A.
[5] Xayimpi v Chairman Judge White Commission (formerly known as Browde Commission) [2006] 2 All SA 442 (E).

Non-Compliance with section 17(1) of the Superior Courts Act

[8] Section 17(1) of the Superior Courts Act provides the test applicable to applications for leave to appeal, and reads as follows:

> "(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 on 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."

[9] The Supreme Court of Appeal in *Smith,*[6] when discussing the threshold to be set in regard to an application for leave to appeal, expressed itself as follows:

> 'What the test of reasonable prospects of success postulates is a dispassionate decision, based on the facts and the law that the Court of Appeal could reasonably arrive at a conclusion different to that of the trial court. In order to succeed, therefore, the appellant 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 words, be a sound, rational basis for the conclusion that there are prospects of success on appeal.'

[6] S v Smith 2012 (1) SACR 567 (SCA) ([2011] ZASCA 15) at paragraph 7.

[10] Without any clear and succinct grounds of appeal, there can be no reasonable prospect of success.

[11] Additionally, the court determining an application for leave to appeal ought to enquire whether there is a compelling reason for the appeal to be heard.[7] The enquiry is factual and, therefore, each application ought to be decided on its own facts. Other considerations beyond the abovementioned statutory provisions would include where the material case is of substantial importance to the appellant and where the decision sought to be appealed against involves an important question of law[8] or where required by the interests of justice.[9] There are no facts furnished for consideration in this regard. Consequently, there is no compelling reason why leave to appeal should be granted, none could be found in the papers filed of record.

Issue of Costs

[12] On the question of costs, the Applicants' submission is that the Court *a quo* erred in not awarding punitive costs in their favour. It is a general, and trite, principle that costs usually follow the outcome. In this application even though the application was dismissed, the Court *a quo* in its discretion made no order as to costs. There are no reasonable prospects of success on this point as well. The Applicants were found not to be successful in their application, and ordinarily, the Applicants ought to have been liable for the First Respondent's costs.

[7] Erasmus, Superior Court Practice (2021) A2-56 to 57.
[8] Erasmus, Superior Court Practice (2021) A2-56 to 57.
[9] City of Tshwane v Afriforum 2016 (6) SA 279 (CC) par 40.

[13] As regards costs of this application, there appears to be no reason why the Applicants should not be mulcted with costs. The judgment referred to by the First Respondent in the Heads of Argument, is on point. In its approach to costs, the Constitutional Court in *Ferreirra*,[10] held that:

> "The Supreme Court has, over the years, developed a flexible approach to costs which proceeds from two basic principles, the first being that the award of costs, unless expressly otherwise enacted, is in the discretion of the presiding judicial officer, and the second that the successful party should, as a general rule, have his or her costs. Even this second principle is subject to the first. The second principle is subject to a large number of exceptions where the successful party is deprived of his or her costs. Without attempting either comprehensiveness or complete analytical accuracy, depriving successful parties of their costs can depend on circumstances such as, for example, the conduct of parties, the conduct of their legal representatives, whether a party achieves technical success only, the nature of the litigants and the nature of the proceedings. I mention these examples to indicate that the principles which have been developed in relation to the award of costs are by their nature sufficiently flexible and adaptable to meet new needs which may arise in regard to constitutional litigation. They offer a useful point of departure. If the need arises the rules may have to be substantially adapted; this should however be done on a case by case basis. It is unnecessary, if not impossible, at this stage to attempt to formulate comprehensive rules regarding costs in constitutional litigation."

[14] Sight should not be lost of the fact that the Applicants are lay persons as far as legal proceedings are concerned, and have represented themselves in these proceedings. A fact that weighed heavily with the Court *a quo* when it opted not to mulct the Applicants with costs in the main application. On this reasoning as well,

[10] Ferreira v Levin NO & Others; Vryenhoek & Others v Powell NO and Others 1996 (2) SA 621 (CC) at para 3.

though the Applicants should be ordered to pay the First Respondent's costs for this application, it should not be on a punitive scale of costs.

[15] In the premises the application for leave to appeal is dismissed with costs on a party and party scale.

E M KUBUSHI
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Date of hearing: 21 February 2024

Date of judgment: 08 March 2024

APPEARANCES:

For the Applicants:	In Person
For the Third Respondent:	Adv J Minnaar instructed by Hammond Pole Majola Attorneys.