

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 2023-042792

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

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In the matter between:

ALTRON TMT (PTY) LTD
Applicant

and

CITY OF TSHWANE METROPOLITAN MUNICIPALITY
Respondent

First

BRILLIANT TELECOMMUNICATIONS (PTY) LTD

Second Respondent

CBX TECH (PTY) LTD
Respondent

Third

REASONS

[1] DE VOS AJ

- [1] On 30 October 2023, this Court granted an order refusing an application for leave to appeal by Brilliant Telecommunications (“Brilliant Tel”) with costs on a punitive scale.
- [2] The Court granted the order with reasons to follow. These are the reasons.
- [3] Brilliant Tel and Altron bid for the same tender. Brilliant Tel was successful. Altron is reviewing the award. Altron is, as part of its procedural rights, entitled to the record of the decision. The Municipality was willing to provide the record, but Brilliant Tel objected. Brilliant Tel objects on the basis of confidentiality. Brilliant Tel contends that the record contains pricing and other trade secrets which its competitor, Altron, cannot have. Altron claimed it had a right to the record in order to pursue its review of the tender award.
- [4] The parties resolved the issue by entering into a confidentiality agreement. The agreement provided that Altron’s legal team would have access to the alleged confidential documents. They were prohibited from disclosing the alleged confidential documents to Altron until a Court had made a final decision on the confidentiality of these documents. Only if the Court found the documents were not confidential could the legal team disclose the documents to Altron, and they would become a matter of public record.
- [5] This Court was seized with the confidentiality dispute. The dispute was to determine whether the documents referred to in the confidentiality agreement were, in fact, confidential. The documents covered by the confidentiality agreement are broader than the Rule 53 record. The documents covered by the agreement included the Service Level Agreement between Brilliant Tel and the Municipality, concluded after Brilliant Tel received the award. These would not normally form part of the record, as it was concluded subsequent to the decision to award the tender. However, the parties included it in the reach of the confidentiality agreement.
- [6] The dispute was heard in the urgent court over two days. The Court dismissed Brilliant Tel’s claim that the documents were confidential and ordered that they be disclosed to Altron and uploaded onto caselines – to form part of the court file.

[7] Brilliant Tel's grounds for leave to appeal are directed at the Court's finding that the matter was urgent, the documents are not confidential and that it is to pay the costs of the proceedings on a punitive scale. Altron opposes the application for leave to appeal and contends that the order was interlocutory and, therefore, not subject to an appeal; the documents have already been released, rendering the application moot, and the application, in any event, bears no prospects of success.

[8] I deal with the grounds of appeal relating to the documents first before the grounds of appeal in relation to urgency are addressed.

Confidential documents

[9] It is common cause that by the time the application of leave to appeal was launched, the documents had been released to Altron, were uploaded onto caselines and were in the public domain. Specifically, all parties accepted that the documents referred to in paragraph 52.2 of the court order have been delivered to Altron. They were from that moment on, and still are, in the public domain. This cannot be undone.

[10] Altron submits that, in light of the disclosure of the documents, even if Brilliant Tel is granted leave to appeal, there is no issue which is to be disposed of on appeal which will have any practical impact or will lead to a prompt resolution of the real issues between the parties. On this basis, contends Altron, the matter is moot.

[11] Section 16(2)(a) of the Superior Courts Act gives an appeal court the power to dismiss an appeal where the judgment or order on appeal would have no practical effect or result. Similarly, a court hearing an application for leave to appeal may dismiss the application if it is of the view that the judgment or order on appeal would have no practical effect or result.

[12] Our courts have, on two occasions, dealt with mootness relating to the disclosure of a confidential document. On both occasions, the Courts, both of which bind this Court, held that such an appeal would be moot.

[13] The first is the judgment of the Supreme Court of Appeal in *Qoboshiyane NO and Others v Avusa Publishing Eastern Cape (Pty) Ltd and Others* ("Qoboshiyane NO").¹ In that matter, the MEC for Local Government and Traditional Affairs appointed an independent investigative team to look into allegations of maladministration in the

¹ (864/2011) [2012] ZASCA 166; 2013 (3) SA 315 (SCA) (21 November 2012)

Nelson Mandela Bay Municipality. The investigation resulted in a report. The media sought access to the report, and the MEC refused the request on grounds of confidentiality. The media challenged the confidentiality claim by the MEC. The High Court dismissed the MEC's claim of confidentiality and ordered the disclosure of the report. The MEC did so. Eight days after disclosing the report, the MEC sought leave to appeal against the High Court's decision to order the disclosure.

[14] The Supreme Court of Appeal dismissed the MEC's appeal on the ground that (amongst others) the issue had become moot as the report was already in the public domain. The Court held –

“The disclosure of the report means that any judgment or order by this court will have no practical effect or result as between the parties. In the circumstances this court may dismiss the appeal on that ground alone.”²

[15] The facts in *Qoboshiyane NO* are similar. The reasoning of the Court on the issue of mootness binds this Court.

[16] The second judgment is that of the Constitutional Court in *Van Wyk v Unitas Hospital and Another (Open Democratic Advice Centre as Amicus Curiae)*.³ The case also turned on a claim of confidentiality. The broader circumstances were different as Ms Van Wyk sought a report from a hospital for purposes of her delictual claim against the hospital after her husband died in its care. Dr Naudé, a specialist physician who was one of the medical doctors who had treated her deceased husband, had prepared a report on the nursing conditions at the hospital. He did this in his capacity as the director of the multi-intensive care unit at the hospital and as chairperson of the hospital board. Ms Van Wyk believed that this report could help her to establish negligence on the part of the hospital staff.

[17] The High Court ordered the disclosure of the report. The Hospital appealed and a majority of the Supreme Court of Appeal upheld the confidentiality claim. Ms Van Wyk then sought leave to appeal from the Constitutional Court. Before the Constitutional Court heard the application for leave to appeal, Ms Van Wyk had obtained a copy of the report.

² Id at para 5

³ 2008 (2) SA 472 (CC) at [26]

- [18] The Constitutional Court refused to grant leave to appeal because the resolution of the main issue would have no practical effect on the parties, as Ms Van Wyk had already been provided with the report on the basis of mootness.
- [19] It is common cause that the documents in paragraph 52.2 of the order have been given to the applicant. The concrete position is that the documents have been disclosed. They have been provided to Altron, they have been uploaded onto caselines, and they are a matter of public record. No practical purpose would be served in reversing the decision in paragraph 52.2 on appeal. The appeal would be of academic interest only. Any appeal against the Court's order to disclose the documents is, therefore, moot.
- [20] Brilliant Tel has provided no argument, case law or fact to dissuade the Court that the matter is not moot. It has not sought to distinguish the present matter from *Qoboshiyane NO* and *Van Wyk* and has provided no case law to the contrary.
- [21] The Court appreciates that there are instances where leave should be granted, even when the issues have become moot, where a public interest would be served by such an appeal. However, no such case has been made before this Court. Brilliant Tel has not identified any legal issue of public importance that arose in this matter that would affect matters in future or any grounds to demonstrate that it would be in the interests of justice to grant leave to appeal. Brilliant Tel has not sought to make out such a case on the papers before the Court.
- [22] For these reasons, the application for leave to appeal against the decision to disclose the documents falls to be dismissed.

Urgency

- [23] Brilliant Tel seeks leave to appeal against the Court's decision that the matter is urgent. Altron contends that the decision on urgency is not appealable, and, in addition, reversing the decision on urgency on appeal will have no practical effect or result.
- [24] An order in terms of rule 6(12) that a matter should be heard as a matter of urgency is not final nor definitive of the rights of the parties nor does it have the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings. An order, in terms of rule 6(12), is no more than an order directing how

a matter should proceed.⁴ The procedural character of a decision on urgency has been repeatedly held to be non-appealable.⁵ The court in *Lubumbo v Presbyterian Church of Africa*⁶ held that an order that a matter should be heard as a matter of urgency is not appealable. This approach was also adopted by the Supreme Court of Appeal in *Cornerstone Logistics (Pty) Ltd and Another v Zacpak Cape Town Deport (Pty)*⁷ where the court held that the issue of urgency was moot because the court *a quo* decided to hear and dispose of the matter on a semi-urgent basis, and that could not be undone.

[25] The Court has already determined the matter is urgent. The parties agreed to an interim order, the matter was fully ventilated, decided and implemented. It is unclear how, practically, Brilliant Tel proposes an appellate court must undo these events that followed on a finding of urgency.

[26] Altron submits that the application was instituted on 1 August 2023, argued on 18 August 2023 and 1 September 2023 and judgment was granted on 8 September 2023. By the time the application for leave to appeal was argued on 13 October 2023 more than 2 months would have expired since the application for the release of the documents was instituted. Altron submits that the question of urgency is now of academic interest only. No point would be served in an appeal court revisiting the issue of urgency because the merits were heard and decided. This cannot be reversed. There is absolutely no prospect of an appeal court referring the application to the High Court for a hearing on the merits *de novo*.

[27] These submissions are persuasive.

[28] Even if the Court were wrong in this regard, and were it not for the binding authorities on the point, the Court could only grant leave to appeal if it were in the interest of justice, but, again, Brilliant Tel has made no case in this regard. Brilliant Tel has not advanced any reasons why it would be in the interest of justice to grant leave to appeal on the issue of urgency.

⁴ Dickson and Another v Fisher's Executors 1914 AD 424 at 427; Lubumbo at 243A-B

⁵ Mannat and Another v De Kock and Others (18799/2018) [2020] ZAWCHC 54 (22 June 2020); Ba-Mamohlala and Big Mash JV v Mafube Local Municipality and others Free State Provincial Division, case number 3942/2021 (unreported)

⁶ 1994 (3) SA 241 (SE)

⁷ Ltd 2022 JDR 0101 (SCA) at [30]

[29] Furthermore, when pronouncing on urgency, a court is exercising a wide discretion. An appeal court can only interfere with the exercise of that discretion if it is manifest that the judge misdirected herself.⁸ This has not been shown. Whilst Brilliant Tel takes issue with the Court's approach to urgency, the basis for its claim of misdirection is merely a regurgitation of the same arguments on self-created urgency.

[30] For these reasons, the application for leave to appeal against urgency is dismissed.

Further affidavit

[31] Brilliant Tel complained of the fact that the documents had become public in its application for leave to appeal. This fact, of course, does not arise from the record as it transpired after the hearing.

[32] The Supreme Court of Appeal in *South African Police Service Medical Scheme and Another v Lamana and Others*⁹ held that where facts relevant to the exercise of the appeal court's discretion under s21A(1) of the Supreme Court Act 59 of 1959 (the predecessor to s16(2)(a) of the Superior Courts Act 10 of 2013) do not appear from the record, those facts must be placed before the court by way of an affidavit by the party seeking to rely on them and in sufficient time to enable the other party to deal with those facts. The same applies to an application for leave to appeal in whatever court it is brought. The same view was held by the Constitutional Court in *Van Wyk v Unitas Hospital and Another (Open Democratic Advice Centre as Amicus Curiae)*.¹⁰

[33] Brilliant Tel did not place this evidence properly, through the filing of an affidavit, before the Court. It introduced the evidence in its application for leave to appeal as one of the grounds for appeal.

[34] Altron responded to the introduction of this piece of evidence by filing an affidavit setting out how the documents had been disclosed and were part of the public domain. In response, Brilliant Tel delivered a Rule 30 notice claiming that Altron's affidavit was irregular. Altron, in turn, and out of an abundance of caution, delivered

⁸ Id at para [30]

⁹ 2011 (4) SA 456 (SCA) at [13]

¹⁰ Above at para 16

an application for leave to deliver its affidavit. Brilliant Tel opposed the introduction of Altron's affidavit.

[35] The contents of the affidavit Altron seeks to place before the Court are relevant to the determination of whether granting leave to appeal will serve any practical purpose. The contents are not disputed. Altron could only appropriately place them before the Court by means of an affidavit. In addition, Altron was responding to Brilliant Tel's irregular introduction of evidence in its application for leave to appeal. In these circumstances, it is entirely appropriate that Altron filed this additional affidavit. To the extent necessary the Court permits the filing of this further affidavit.

Costs

[36] Altron has been substantively successful and is entitled to its costs. No basis has been presented to deviate from this principle. Brilliant Tel was asserting its commercial interest in litigation and was unsuccessful. In such circumstances, Altron is entitled to its costs.

[37] Altron also requested a punitive costs order from this Court to show its displeasure in how Brilliant Tel had conducted itself, particularly as it repeatedly increased the costs involved in this litigation. The Court was persuaded by this argument, particularly in light of Altron's approach to the further affidavit and its approach to the hearing of this application for leave to appeal.

[38] It weighs with the Court that Brilliant Tel inappropriately placed facts before the Court, then opposed Altron's attempt to place facts before the Court properly, filed a Rule 30 notice and then opposed the introduction of the affidavit, containing common cause facts which are relevant to the determination of the dispute. Brilliant Tel's opposition was baseless.

[39] Brilliant Tel responded to Altron's further affidavit. The content of this affidavit is unfortunate. It contains largely, personal attacks on Altron's attorney of record. It does not dispute the relevant facts: that the documents are part of the public domain. Not only are the attacks inappropriate and ad hominem, but they also rely on an entirely faulty premise. Brilliant Tel's premise for its attack on Altron's attorney is that it contends Altron was engaging in sharp practices in disclosing the documents so soon after the judgment was handed down. Brilliant Tel claims that it

was entitled to 15 days to consider whether it sought leave to appeal, and during this period, Altron was not entitled to disclose the documents. Brilliant Tel contends that the release of the documents was a purposeful stratagem to render the application for leave to appeal moot.

[40] The order of this court is interlocutory. Therefore, not even the application for leave to appeal would have suspended its operation. It is only final orders that are suspended pending an appeal. The right which Brilliant Tel claims Altron infringed, does not accrue to Brilliant Tel in these circumstances. There is a second way in which Brilliant Tel is mistaken. There is nothing which states that Altron was prohibited from implementing the order for 15 days until Brilliant Tel's period for launching its application for leave to appeal has expired. The Court asked counsel for Brilliant Tel on what basis this submission rests. The Court was not provided with case law or authority to support the submission. Brilliant Tel relied solely on the rules providing that it had 15 days to institute its application for leave to appeal. Brilliant Tel's submission is not borne by the authority it relies on.

[41] Brilliant Tel attacked Altron's attorney in a manner which was unfortunate. Worse for Brilliant Tel when asked what the basis for its attack was, it could point to no such basis in law.

[42] The second issue which must be considered is Brilliant Tel's approach to the hearing of this application for leave to appeal. In short, Brilliant Tel did not comply with the court order for the filing of written submissions prior to the hearing of the application for leave to appeal. The heads were filed the day before the hearing and then additional heads were presented on the day. Altron referred to this as a basis for punitive costs against Brilliant Tel. The Court, out of fairness to Brilliant Tel, inquired how it would like to deal with this, in particular, whether it wished to file any affidavits to explain the issue. The concern, as expressed by the Court was that in so doing, the costs involved would escalate. Counsel for Brilliant Tel elected to file another affidavit to explain the non-compliance with the Court order. This led to a further exchange of affidavits. In these further affidavits, Brilliant Tel persisted with the ad hominem attacks and indicated that there was something untoward in being required to file a further affidavit. The Court did not require the filing of a further affidavit, counsel for Brilliant Tel made that election.

[43] When combined with an application for leave to appeal against a decision which has been implemented, absent any allegation of broader public interest, the application for leave to appeal is to be dismissed with costs on a punitive scale.

[44] The Court notes that it had omitted to mention the costs involved in the application for leave to introduce the further affidavit in its order of October 2023. The Court is empowered to vary its orders, particularly when it erroneously omits to deal with costs. In this case one aspect of the issue of costs was not expressly mentioned. To the extent this omission may lead to confusion, the Court wishes to vary the costs order to include these costs specifically. In the order which follows, this is corrected.

Order

[45] The following order is made:

- a) The application for leave to appeal is dismissed.
- b) Brilliant Tel is to pay Altron's costs on an attorney and client scale, including the costs incurred as a result of Brilliant Tel's opposition to Altron's further affidavit, and including the costs in relation to the filing of affidavits in response to Brilliant Tel's late filing of its written submissions.



I de Vos
Acting Judge of the High Court

Delivered: This judgment is handed down electronically by uploading it to the electronic file of this matter on CaseLines. As a courtesy gesture, it will be sent to the parties/their legal representatives by email.

Counsel for Altron:

T Prinsloo

Instructed by:

Lowndes Dlamini In

Counsel for Brilliant Tel:
Instructed by:

TJ Maschaba SC
Kekana Hlatswayo Radebe

Date of the hearing:
Date of judgment:

13 October 2023
5 January 2023