IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION PRETORIA

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

26 April 2024
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DATE

Case Number: B3217/2023

GHUBHELABM (PTY) LTD	First Applicant
BUYILE MKHIZE	Second Applicant

and

R.A.W. TRUCK TRADING CC	First Respondent
RODNEY PLETT	Second Respondent

JUDGMENT

SC VIVIAN AJ

1. The applicants seekleave to appeal. Their application was brought out of time and they accordingly seek condonation. The respondents do not oppose condonation. They are not prejudiced. The delay is short and an explanation is given. I accordingly condone the lateness of the application for leave to appeal.

2. The requirements for leave to appeal are contained in Section 17(1) of the Superior Courts Act (Act 10 of 2013). The applicants contend that leave to appeal should be granted on the basis that the appeal would have a reasonable prospect of success.

3. In **Ramakatsa**, the Supreme Court of Appeal held that

> "The test of reasonable prospects of success postulates a dispassionate decision based on the facts and the law that a court of appeal could reasonably arrive at a conclusion different to that of the trial court. In other words, the appellants in this matter need to convince this Court on proper grounds that they have prospects of success on appeal. Those prospects of success must not be remote, but there must exist a reasonable chance of succeeding. A sound rational basis for the conclusion that there are prospects of success must be shown to exist."[1]

4. The factual background to this matter is set out in my judgment and I do not intend to repeat it in this judgment.

5. Mr Mpenyana, who appeared for the applicants, focussed his argument on the truck. He informed me that the applicants do not seek leave to appeal in respect of the trailers.

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[1] Ramakatsa v African National Congress (724/2019) [2021] ZASCA 31 (31 March 2021) at par 10, referring to Smith v S [2011] ZASCA 15; 2012 (1) SACR 567 (SCA); MEC Health, Eastern Cape [2016] ZASCA 176, par 17

6. Mr Mpenyana reiterated that the first applicant is the owner of the truck. The first respondent is in possession of the truck. The first respondent relies on a preservation lien as the only defence to the vindication of the truck.

7. According to the applicants, the first respondent did not establish the lien because it did not produce an invoice from the towing company. The lien should have been dealt with at an early stage. When the second applicant sought to collect the truck, the respondents should have told her that the first applicant needed to pay the towing costs and storage costs, what those costs were and that, if these charges were paid, the truck would be released.

8. In reply, Mr Mpenyana emphasised that the respondents did not draw a clear division between the truck and the trailers. There is merit in this submission. On 19 June 2023, the applicants' attorneys sent a letter of demand to the first respondent. They demanded return of the truck and trailers. The second respondent sent an email response on the same day. He did not tender return of the truck. Instead, he attached "*a breakdown of her repayments*" and said "*The trailer and truck will be valued and once we are in possession of the valuation, we will forward copies to your client as well as to yourself.*" The breakdown of payments is in fact a statement of account. It includes the outstanding instalments for the trailers, charges for a tracing agent, a recovery fee and the towing charges. There is no indication on that document or in the email that the the first applicant need only pay the towing charges to recover the truck. There is no indication of storage charges.

9. In the circumstances, the first applicant was justified in launching proceedings, but only for vindication of its truck.

10. However, the first respondent did draw a division between the truck and the trailers in its answering affidavit. It made it clear that it is entitled to retain possession of the trailers by virtue of the terms of the sale agreement (as amended). It was further entitled to retain the truck and trailers by virue of its lien.

11. There was no obligation on the first respondent to expressly raise the lien prior to the commencement of court proceedings. Its failure to do so may have attracted an adverse costs order had the first applicant tendered either payment of the towing charged and storage fees or tendered alternative security. But it does not have the result that the lien is lost.

12. The first respondent is entitled to retain possession of the truck until it has been reimbursed for its expenditure.[2]

13. In my view, there are no grounds a court of appeal could reasonably arrive at a conclusion different to that which I arrived at in my judgment.

14. The second applicant's position is worse. She is the sole director of the first applicant. I pointed out in my judgment that she had not explained why she was cited as a party in these proceedings or why she had standing to seek an order that the truck and trailers be restored to her.

15. The applicants delivered a notice of application for leave to appeal supported by an affidavit deposed to by the second applicant. The notice informs the

[2] Goudini Chrome (Pty) Ltd v MCC Contracts (Pty) Ltd 1993 (1) SA 77 (A) at 85C

reader that “the applicant” intends to apply for leave to appeal. But any ambiguity is cleared up in the founding affidavit. The second applicant expressly says that she is the second applicant in the application for leave to appeal.

16. When I pushed Mr Mpenyana for an explanation as to why the second applicant was cited as an applicant in the application for leave to appeal, he said that she was a party to the main application. He said that there were a lot of interactions between the second applicant and the second respondent.

17. Similarly, Mr Mpenyana could not offer a proper explanation as to why the second respondent was cited as a party in the application for leave to appeal, save for the interactions between the second applicant and the second respondent.

18. These submissions ignore corporate identity. The second applicant is not the owner of the truck and does not have *locus standi* to seek its vindication.

19. The second respondent is not personally in possession of the truck and ought not to have been cited in these proceedings. It is common case that it is the first respondent that has possession of the truck. Mabindla-Boqwana JA explained in a recent Supreme Court of Appeal judgment that directors of companies are only personally liable where they contravene provisions of the Companies Act (Act 61 of 2008). The general position is that directors do not incur personal liability for their conduct as directors.[3] The first respondent is a close corporation. The same principle applies. The general position is that members

[3] Venator Africa (Pty) Ltd v Watts and Another (053/2023) [2024] ZASCA 60 (24 April 2024)

of a close corporation do not incur personal liability for their conduct as members.

20. I said in my judgment that neither the second applicant nor the second respondent should have been cited in these proceedings. The second respondent ought not to have been cited in this application.

21. However, there may be a basis on which the second applicant was properly before me in this application. I ordered costs against the applicants jointly and severally and on the attorney and client scale. In her affidavit, the second applicant says that I erred and misdirected myself in imposing a punitive costs order. The second applicant is entitled to apply for leave to appeal because that part of the order is against her.

22. I considered the argument on the scale of costs. Leave to appeal is rarely granted against costs orders. An appeal court is slow to interfere in a costs order.[4] A costs order is an exercise of judicial discretion. Whilst the applicants disagree with the order that I granted, they do not point to anything that shows that my discretion was not judicially exercised or was exercised on incorrect facts.

23. Leave to appeal must accordingly be refused.

24. Mr Hollander again pressed for a punitive costs order. I do not consider that to be appropriate. It was the cumulative effect of various factors that led me to grant a punitive costs order in the main application. Most of those factors are not present in this application.

[4] Van Zyl v Steyn (83856/15) [2022] ZAGPPHC 302 (3 May 2022) at para's 17 to 20

25. It remains to consider the appropriate scale of costs in terms of Rule 67A read with Rule 69. The new rules came into effect on 12 April 2024. In **Mashavha**, Wilson J held that the amendments operate prospectively.[5] I agree.

26. **Mashavha** raises a number of interesting issues, including whether Scales B and C should only be awarded in *"… truly important, complex or valuable cases.*"[6] It is not necessary for me to consider whether this is correct, but my judgment should not be viewed as endorsing this approach.

27. Costs orders, including the assessment of the appropriate Rule 69 scale, remain a matter for the exercise of judicial discretion.

28. Just as was the case in **Mashavha**, Mr Hollander predictably sought costs on Scale C. He said that this matter should have come to an end after the answering affidavit was filed and that the respondents had been forced to become embroiled in an opposed matter, commencing with an urgent application.

29. In my view, the factors relied on by Mr Hollander are outweighed by the factors that are expressly referred to in Rule 67A(3)(b). First, this is not a complex matter. The very reason why it should have ended after the answering affidavit is that it is not complex.

30. Second, in considering "*the value of the claim or importance of the relief sought*", from the point of view of a respondent or defendant, it is necessary to consider the relief sought by the applicant or the defendant. In my view, this is

[5] Mashavha v Enaex Africa (Pty) Ltd (2022/18404) [2024] ZAGPJHC 387 (22 April 2024) at para 12
[6] Mashavha v Enaex Africa at para 26

assessed not by considering the outcome of the matter, but what was being sought by the applicant or plaintiff.

31. In this case, the relief sought in the notice of motion was restoration of possession of the truck and trailers. If the respondents were ordered to return the truck, the first respondent ran the risk of never recovering the towing charges and storage fees. The amount at risk was relatively low.

32. The first respondent is the owner of the trailers. The sale price for the trailers was R391 000,00. It is fair to assume that this is the approximate value of the trailers. The first respondent has received payment of the bulk of the purchase price. According to the statement provided by the first respondent, the amount outstanding as at 3 June 2023 (excluding additional charges) was R67 325,00. At the date when the application was launched, the first respondent was (and indeed it remains) in possession of both the money paid in terms of the sale agreement and the trailers. If it were ordered to return the trailers, it would lose security for a debt of R67 325,00. Looked at differently, it runs the risk of losing an asset worth less than R400 000.

33. These are not substantial amounts.

34. Accordingly, taking into account the complexity of the matter and the value of the claim or importance of the relief sought, this is not a matter that warrants a higher scale than Scale A.

Conclusion

35. I accordingly granted an order in the following terms:

35.1. The late delivery of the application for leave to appeal is condoned.

35.2. The application for leave to appeal is dismissed.

35.3. The applicants are ordered to pay the costs of the application jointly and severally, the one paying the other to be absolved. Counsel's fees are to be taxed on Scale A.

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Vivian, AJ
Acting Judge of the Gauteng Division
of the High Court of South Africa

APPEARANCES:

For the Applicants:	K Mpenyana
For the Respondents:	L Hollander
Date of hearing:	25 April 2024
Date Delivered:	26 April 2024