



**IN THE HIGH COURT OF SOUTH AFRICA  
(NORTHERN CAPE HIGH COURT, KIMBERLEY)**

**Case No: 2415/18  
Heard On: 28/07/2022  
Delivered: 03/08/2022**

**In the matter between:**

**FREDERICK LODEWIKUS VAN DER MERWE**

**Applicant**

and

**FRANKEL ENGELBRECHT**

**Respondent**

*Coram: MOSES AJ*

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**JUDGMENT ON APPLICATION FOR LEAVE TO APPEAL**

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**MOSES AJ**

**Introduction**

1. This is an application for leave to appeal against my ex tempore ruling in this matter on 12 May 2021, as well as my judgment regarding the merits of the matter delivered on 23 July 2021, by Dr Frederick Lodewikus Van Der Merwe, the Applicant herein, who is conducting his litigation including this application in person (the Defendant in the main action).

2. This application is opposed by and on behalf of Mr Frankel Engelbrecht, the Respondent herein, and who was the Plaintiff in the main action.
  
3. This application was set down, pursuant to its launching by the Applicant on or about 3 August 2021, for hearing and arguments in this Court for Thursday 28 July 2022. I return to the various emailed correspondence in this regard hereunder. In the event, it was heard by me in open court on 28 July 2022. The Applicant was absent, and is/was not legally represented. The Respondent was legally represented at the hearing by counsel, Ms Sieberhagen, duly instructed by the instructing attorneys of record.
  
4. Having read the documents filed of record, including the various emailed correspondence exchanged between /amongst the parties and the Registrar of this Division, and having heard counsel for the respondent, I was satisfied that the matter was properly set down for hearing and argument by the Registrar of this Division, for 28 July 2022, at 09h00 in Court E, Kimberley High Court, with all the parties having been duly notified thereof.
  
5. I was also satisfied that the Applicant herein, having been duly notified of the Court date and hearing as above-stated, had elected not to attend the said hearing and was seemingly awaiting the outcome of his application for leave to appeal to be decided in his absence. Hence the hearing proceeded in his absence on 28 July 2022.

### **The Application and subsequent emailed correspondence**

6. Before I deal with what I understand to be the Applicant's main contentions for leave to appeal to be granted, I thought it would be prudent to give some chronology since the launching of this application until date of hearing, with reference to the afore-stated emailed correspondence and exchanges amongst the parties and the Registrar, as well as other persons who are/were not involved in this matter.
  
7. On the 3<sup>rd</sup> August 2021 the Applicant filed his "Urgent Filing Notice", wherein he refers to, and annexed, inter alia, a "Notice To Apply For Leave To Appeal", an "urgent letter dated 30 July 2021 addressed to the "Plaintiff's Legal Team", an article in the Sunday Times newspaper dated 1 August 2021, and a certified copy of an identity document of one Louis Theunis Janse Van Vuuren.
  
8. The Applicant directed an email to the Registrar, Ms Basson on 16 February 2022, around 09h35 stating inter alia the following:

"Re: Urgent: Requiring Dates For Set Down of Kimberley: Application for Leave To Appeal Judgment: Moses AJ"
  
9. The Registrar then replied in an email dated 16 February 2022 at 14h03, to the Applicant and Respondent Attorneys (and 2 others) acknowledging receipt of the above-stated email.

10. The Registrar then sent an email dated 17 March 2022 to ALL the parties, the Applicant included wherein she provided possible dates for the hearing of the application for leave to appeal, namely 8 April 2022, 14 April 2022 and 22 April 2022.
11. The Respondent's attorneys then sent an email dated 29 March 2022 at 09h34 (by Ms Elzaan) to ALL PARTIES, including the Applicant and Registrar, stating that "to date Mr Van Der Merwe has not confirmed a date for hearing of his application for leave to appeal", and if he has not done so by 1 April 2022, then the Respondent "... will proceed to place his application for 22 April 2022 in order to have same dismissed and to enable us to proceed with taxation herein."
12. The Applicant then sent an email dated 30 March 2022 around 15h58, to the Registrar, and Ms Sievers of the "Cape Town – Registrar of the Deputy Judge President – Honourable Judge Goliath", and others, including the Respondent's attorneys, in reply to Respondents' email of 29 March 2022, in essence stating that; ( emphasis in the original)
  - a) these dates in April 2022, were "not discussed with Applicant beforehand, to which I take exception,";
  - b) that he "does NOT agree, nor conceded to any of the proposed dates and/or to have it set down by Plaintiff: Engelbrecht's legal team..."
  - c) that he is still awaiting a "proper Court Documents signed by AJ Moses to the Applicant: Dr Fred Kimberley: Application for leave to Appeal ("ALA")... AND "...the legally binding, duly and properly dated signed by Moses AJ –

Court stamped – Court Document from the Acting Judge: Judge Moses...”

and

- d) alleging that the Respondent Attorneys “are in contempt of court” and that their “...premature planned – unlawful and vexatious Kimberley “TAXATION” has been set aside in terms of Superior Court Act and must then be reported a VEXATIOUS...”

13. The Applicant then sent another email dated 1 April 2022 around 12h11 referring to his email below dated 31 March 2022 around 09h30, to the Registrar and the Respondent’s Attorneys, and others (Ms Sievers Dr Lente Van Der Merwe)

13.1 in which he refers to “we are awaiting the outcome...” of a seemingly consolidation application and an application to transfer a matter (s) regarding ...”a direct nexus to ESTATE AND SHAM-TESTAMENTARY TRUST/TRUSTEE.” ( emphasis in the original) and

13.2 requested “... official and legally binding, signed by AJ Moses – Court stamped document regarding outcome to “ALA” Application, by the Defendant (as Applicants ALA)” and stating

“Kindly take note that Dr Fred does NOT agree to any application to any dates, by the Plaintiff and/or his legal Teams.”

14. The Registrar then sent an email dated 13 April 2022 around 08h41, to the Applicant, Dr Van Der Merwe, and to one Elzaan of the Respondent Attorneys and to Dr Lente Van Der Merwe advising and stating that:

- 14.1 “All communicate to the Judges are routed through the Office of the Registrar”
- 14.2 “The dates (and ancillary directives) in all applications for leave to appeal are provided by the Judges and conveyed through the Registrar’s Office.”
15. The Respondent’s attorneys then sent an email dated 26 April 2022, to the Registrar and to the Applicant, Dr Van Der Merwe, wherein they requested dates for finalisation of the application for leave to appeal “soonest.”, indicating that they are/were not involved in any litigation by the Applicant in Cape Town, and that that does not have any effect on the application for leave to appeal, which in any event will be for the judge to decide on the day of the hearing.
16. On 7 June 2022 around 11h48 the Registrar sent an email to all the parties concerned, including the Applicant, giving them notice: “As per direction of the Presiding Judge:
1. The matter be and is hereby set down for hearing on 28 July 2022;
  2. The matter will be hard (sic) in Court E at 09h00.”
- (This is on page 1 of the Court Bundle, received and marked “ALA2”).
17. Pursuant to this above-stated emailed notification by the Registrar, the Respondent’s attorneys filed and sent an emailed “Notice of Set- down” dated 18 July 2022, to the Registrar and the Applicant, wherein the contents of the above-stated emailed notification by the Registrar were basically repeated but which the Respondent filed and served electronically, so it was submitted by counsel for the Respondent during oral argument, “...for clarity purpose.” Counsel for the Respondent further submitted that this was also done, bearing

in mind the Applicant is a layperson in law, although highly educated, is appearing in person and/or conducting his own case, and which was sent to him to serve as a reminder of the hearing date for the application for leave to appeal.

18. There was/is no response and/or reply to the above stated two emails from the Registrar and the Respondent's attorneys, by the Applicant, until 27 July 2022, a day before this hearing date, wherein the Applicant, in an email dated 27 July 2022, around 14h19, and addressed to the Respondent's attorneys, the Registrar, and "ocj complaints" referred to his annexed "Practice Note By Defendant", in respect of this case. This emailed document was handed in and received marked "ALA1."
  
19. Having perused and studied the Applicant's "Practice Note" in annexure ALA1, there are, to my mind, only four (4) aspects relevant to the determination of this application for leave to appeal. Firstly the Applicant is suggesting that he never did, and still does not, agree to this hearing date set down for 28 July 2022, and hence that: "This matter should NOT be ALLOCATED and/or ENROLLED and be struck from the Roll, if indeed allocated." ( original emphasis) Secondly he is suggesting that since he had "lodged" his application for leave to appeal, as referred to above, the presiding judge must henceforth provide him with a "...Proper Formal signed and Court stamped OUTCOMES TO DEFENDANT'S APPLICATION TO LEAVE TO APPEAL JUDGMENTS by an ACTING JUDGE..."( original emphasis). Thirdly he appeared to be under the impression that the Respondent had set the matter

down for hearing on the said date, and had overlooked and/or ignored the emailed notice sent to all the parties, including himself, by the Registrar, as referred to above. Lastly it is evident from this Practice Note that the Applicant had indeed received the above-stated emailed notification of the set down dated of 28 July 2022, as well as the Respondent's Heads of Argument, but that he had decided that he "the Defendant, a medical specialist, will NOT attend any COURT PROCEEDINGS tomorrow, as I am scheduled to perform critical neurosurgical procedure (and will NOT even consider any purported "postponements/costs' AS FURTHER EXTORTION BY Plaintiff's will be put forward" (emphasis in the original).

### **Brief evaluation and Judgment**

20. It is clear from what has been stated and referred to hereinabove that the Applicant, who launched this application, late and defective as it is, and who initially seemed to apply on an "urgent" basis, and "urgently" requiring dates for set down of this application for leave to appeal my afore-stated Ruling and Judgment, was/is the person who stubbornly refused, to date, to either agree to a date to set the matter down for hearing and who refused to adhere to the set down date as notified by the Registrar. He has only himself to blame for not adhering to the stated notice of set down issued by the Registrar, and for not being present at the hearing of his application for leave to appeal.
  
21. What is also clear from the papers before this Court, is that the Applicant's application for leave to appeal is not easily comprehensible, deviating in form and style usually followed in practice in accordance with the Rules of Court, to



the extent that the Respondent argued, justifiably, that the application ought to be dismissed on the grounds of non-compliance with the Rules of Court. Having considered Respondent's counsel's submissions in this regard, and bearing in mind that the Applicant is a lay person insofar as the practice of law is concerned, conducting his own case, I am of the view that such deviations and defects as there may be in this application, in the exercise of my discretion in this regard, be overlooked and condoned. To my mind this would enable the parties and this Court to focus and concentrate on the merits of the application, the grounds for the application insofar as it is discernible from the compounded and sometimes incoherent statements by the Applicant in his papers before Court.

22. In this regard I agree with counsel's submission that only two possible grounds of appeal can be discerned from the Applicant's application, namely:

22.1 that the trial proceeded in his absence; and

22.2 that he disputes that this Court had the necessary jurisdiction to adjudicate upon the action.

23. With regard to the first ground as above-stated – that the trial proceeded in his absence –, I refer to what I have stated in my ex tempore ruling and in my judgment, more particularly paragraphs 28 to 33 and paragraphs 43 to 44 thereof, which I deem not necessary to repeat herein.

24. In the circumstances, I found that the Applicant was very well aware of the fact that the trial would be proceeding on the 12<sup>th</sup> of May 2021. As indicated in my

ex tempore ruling and judgment, he filed voluminous bundles of documents but elected not to be present at the adjudication of the trial.

25. With regards to the second ground – the alleged lack of jurisdiction by this Court, I have dealt with this aspect comprehensively to my mind, in my judgment, more particularly paragraphs 108 and 108.1 thereof, which I similarly do not wish to repeat herein.
  
26. In the circumstances, having regard to the applicable provisions of section 17 of the Superior Courts Act, no 10 of 2013<sup>1</sup>, the Applicant must show that he has a reasonable prospect of success on appeal. This section makes it clear that leave to appeal may only be given if this Court is of the opinion that the appeal would have a reasonable prospect of success or if there is some other compelling reason why the appeal should be heard.
  
27. In the present application I find that the Applicant has failed to show, on the facts and in law, that he has a reasonable prospect of success on appeal on both the first and second grounds of appeal referred to above. There is also no other compelling reason why leave to appeal ought to be granted or why the appeal should be heard.

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<sup>1</sup>Section 17. Leave to appeal.- (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 judgements on the matter under consideration.*

- (b) *The decision sought to be appealed does not fall within the ambit of section 16 (2) (a); and 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.*

28. The Respondent's counsel has indicated that the issue of costs is left within the discretion of this Court.

Order:

29. In the circumstances it is ordered:

29.1 The application for leave to appeal is dismissed.

29.2 No order as to costs.

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**J.J. MOSES**

**ACTING JUDGE OF THE HIGH COURT**

**NORTHERN CAPE DIVISION, KIMBERLEY**

For the Plaintiff: Adv. A. S. Sieberhagen

Instructed by: Engelsman Magabane Inc.

For the Defendant: No appearance