Reportable:	YES/**NO**
Circulate to Judges:	YES/**NO**
Circulate to Magistrates:	YES/**NO**
Circulate to Regional Magistrates	YES/**NO**

IN THE HIGH COURT OF SOUTH AFRICA
NORTH WEST DIVISION, MAHIKENG

CASE NUMBER: M658/2020

In the matter between:-

REUBEN XINISHE Applicant

and

LONPLATS MARIKANA COMMUNITY DEVELOPMENT TRUST First Respondent

SIBANYE STILLWATER (PTY) LTD Second Respondent

This judgment is electronically handed down *via* e-mail to the parties' legal representatives. The date and time for handing down of the judgment is deemed to be 2024-01-05 at 10h00.

ORDER

The following order is made:

(i) The application for leave to appeal is dismissed.

(ii) The applicant is to pay the costs of the application for leave to appeal incurred by the respondents.

JUDGMENT OF LEAVE TO APPEAL

FMM REID J:

Introduction

[1] On 2 June 2022 the following orders were made *ex tempore* by this Court, then under the surname Snyman J:

1.1. The *point in limine* is upheld that this Court does not have the necessary jurisdiction to entertain the matter;

1.2. The *point in limine* is upheld that the matter should be referred for arbitration as per the Trust Deed in paragraph 34;

1.3. The *point in limine* is upheld of non-joinder in that the individual trustees of the Trust had to be cited in this application; and

1.4. The applicant is ordered to pay the costs of the application.

[2] The applicant has requested reasons for the *ex tempore* judgment and same were provided on 4 August 2022. The applicant lodged a notice of appeal against the order and the whole judgment granted on 14 September 2022. The applicant pursued the appeal on 6 April 2023 when the applicant applied for leave to appeal. The application for leave to appeal was heard on 27 July 2023.

[3] The background and reasoning for the judgment is set out in detail in the reasons for the judgment dated 4 August 2022 and it will serve no purpose to rehash same.

Grounds of appeal

[4] I summarise the grounds of appeal as follows:

4.1. That the Court misdirected itself in finding that the Community Trust has no legal *persona* separate from the applicant (Reuben Xinishe) and that the Community Trust is the same as a partnership agreement.

4.2. This Court misdirected itself in finding that the applicant, whilst being a member of the Community

Trust, and bringing the application in his personal capacity against the Community Trust, would be akin to the applicant suing himself.

4.3. This Court erred and misdirected itself in holding that the applicant has no legitimate claim against the 2nd respondent, Sibanye Stillwater (Pty) Ltd.

4.4. This Court failed to comprehend the difference between a person appearing in person as opposed to a person appearing in his personal capacity.

4.5. This Court lacked judicial impartiality and entered the arena to the detriment of the applicant.

4.6. This Court erred in allowing the 2nd respondent Sibanye Stillwater to oppose the matter in circumstances where it did not "*provide any defence in the merits"*. The 1st and 2nd respondent filed an answering affidavit opposing the relief sought by the applicant and were represented in court.

[5] In addition to the above grounds of appeal, the following grounds relating to the points *in limine* is raised by the applicant as additional grounds of appeal:

Jurisdiction

[6] The grounds of appeal are that the Court erred in finding that the Court does not have jurisdiction, considering the following:

6.1. The first Trust-Founder Lonmin had already located to Marikana prior to its sale to Sibanye Stillwater (Pty) Ltd.

6.2. The title deed provides that the applicant is authorised to refer the matter to the Courts if the claim is a liquid claim.

6.3. Sibanye Stillwater (Pty) Ltd was not a party to the agreement or a decision which gave rise to the proceedings before Court;

6.4. The decision to pay to the applicant a once off gratuity in the amount of R20,000.00 (Twenty Thousand Rand)

was not made by Sibanye Stillwater (Pty) Ltd but by Lonmin.

Arbitration

[7] The Court erred in finding that the matter should be referred for arbitration on the following bases:

7.1. The principle of equality before the law was completely disregarded by this Court in finding that the matter should be referred to arbitration.

7.2. The applicant's constitutional lights to freedom of choice in instituting litigation proceedings were limited by this Court.

7.3. This Court did not take judicial notice thereof that several political parties or different organisations approach the courts with similar constitutions that prescribes dispute resolution, but that the courts assist them.

Joinder

[8] The Court erred in finding that shareholders and companies should be joined where the applicant bears no knowledge of shareholders and power sharing between the 1st respondent and its subsidiaries or partners.

8.1. This Court failed to recognise that the applicant as a community independent Trustee who is not privy to the internal affairs of the respondent, Sibanye Stillwater (Pty) Ltd or Lonmin.

8.2. The Court erred in finding that the applicant should have enjoined the community trust or trustees, under circumstances where the trustees are not the ones who made the decision to pay applicant a once of amount of R20,000.00 (Twenty Thousand Rand).

Cost order

[9] The Court erred by ordering a cost order against the applicant where a clause or provision in the trust deed renders the applicant immune to a cost order.

[10] In relation to the test for reasonable prospect of success, the following is mentioned by the applicant: *"There are plenty reasonable prospects of success that another Court may come to a conclusion different from the … Court."*

Applicable legislation

[11] The legal basis for leave to appeal is found in section 17(1)(a) of the **Superior Courts Act** 10 of 2013 (Superior Courts Act) which provides that:

> *"(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;"*
>
> (own emphasis)

[12] After the enactment of section 17 of the Superior Courts Act, the test for the application for leave to appeal, has been set out as follows in **S v Kruger** 2014 (1) SACR 647 (SCA):

"[2] Before dealing with the merits of the appeal, it is necessary at the outset to deal with the test applied by the high court in granting leave to appeal to this court. Despite dismissing the appellant's appeal, the high court concluded that it was 'possible' that another court might arrive at a different conclusion and that leave to appeal should not be 'lightly refused' where the person concerned is facing a lengthy sentence of imprisonment. This is an incorrect test. ***What has to be considered in deciding whether leave to appeal should be granted is whether there is a reasonable prospect of success****. And in that regard more is required than the mere 'possibility' that another court might arrive at a different conclusion, no matter how severe the sentence that the applicant is facing. As was stressed by this court in* ***S v Smith*** *2012 (1) SACR 567 (SCA) para 7:*

> *'What the test of reasonable prospects of success postulates is 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 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."*

[3] ***The time of this court is valuable and should be used to hear appeals that are truly deserving of its attention. It is in the interests of the administration of justice that the test set out above should be scrupulously followed****. In the present case it was not, and this court has had to hear an appeal in respect of which there was no reasonable prospect of success."*
(own emphasis)

[13] This test whether to grant leave to appeal or not, was aptly set out in **Cook v Morrisson and Another** 2019 (5) SA 51

(SCA) as follows:

> *"[8] The existence of* ***reasonable prospects of success is a necessary but insufficient precondition for the granting of special leave. Something more, by way of special circumstances, is needed. These may include that the appeal raises a substantial point of law; or that the prospects of success are so strong that a refusal of leave would result in a manifest denial of justice****; or that the matter is of very great importance to the parties or to the public. This is not a closed list (****Westinghouse Brake & Equipment (Pty) Ltd v Bilger Engineering (Pty) Ltd** *1986 (2) SA 555 (A) at 564H – 565E;* **Director of Public Prosecutions, Gauteng Division, Pretoria v Moabi** *2017 (2) SACR 384 (SCA) ([2017] ZASCA 85) para 21)."*
> (own emphasis)

[14] In relation to the meaning of the words "reasonable prospects of success" it was held as follows by Snyman AJ in the Labour Court in **Scheepers v Transnet Bargaining Council and others** (Leave to Appeal) [2023] JOL 59387 (LC):

> *[15]As to the meaning of 'reasonable prospects of success', the Court in* ***Member of the Executive Council for Health, Eastern Cape v Mkhitha and Another*** *[2016] JOL 36940 (SCA) at paras 16 – 17 said the following: 'Once again it is necessary to say that leave to appeal, especially to this Court, must not be granted unless there truly is a reasonable prospect of success. Section 17(1)(a) of the Superior Courts Act 10 of 2013 makes it clear that leave to appeal may only be given where the judge concerned is of the opinion that the appeal would have a reasonable prospect of success; or*

there is some other compelling reason why it should be heard. An applicant for leave to appeal must convince the court on proper grounds that there is a reasonable prospect or realistic chance of success on appeal. A mere possibility of success, an arguable case or one that is not hopeless, is not enough. There must be a sound, rational basis to conclude that there is a reasonable prospect of success on appeal.'

…

[18] The applicant thus failed to show that there exists a reasonable prospect that another Court would come to a different conclusion, and it is my view that the applicant has no prospect of success on appeal. The application for leave to appeal falls to be dismissed. I believe the following dictum from the judgment in ***Martin & East (Pty) Ltd v National Union of Mineworkers and Others*** *(2014) 35 ILJ 2399 (LAC) at 2405J-2406A to be appropriate in deciding to refuse leave to appeal: '… The Labour Relations Act was designed to ensure an expeditious resolution of industrial disputes. This means that courts, particularly courts in the position of the court a quo, need to be cautious when leave to appeal is granted. …'*

[19] All said, the applicant has simply made out no case for leave to appeal. I thus conclude that the applicant, overall, has shown no reasonable prospect that another Court could come to a different conclusion, has no prospects of success on appeal, and the leave to appeal application must fail."

[15] The application of the test for leave to appeal has also been set out in more detail by Prinsloo J in **Hartley v SA Social Security Agency** (Leave to Appeal) [2023] JOL 59800 (LC)

as follows:

> *[15] The test is not whether there is a possibility that another court could come to a different conclusion, the test is whether there is a reasonable prospect that another court would come to a different conclusion.*
>
> *[16] It is further trite that an applicant in an application for leave to appeal must convince the court a quo that it has reasonable prospects of success on appeal. Appeals should be limited to matters where there is a reasonable prospect that the factual matrix could receive a different treatment or where there is some legitimate dispute on the law.*
>
> *[17] In **Seatlholo and others v Chemical Energy Paper Printing Wood and Allied Workers Union and others**, (2016) 37 ILJ 1485 (LC) at para 3. This Court confirmed that the test applicable in applications for leave to appeal is stringent and held as follows: 'The traditional formulation of the test that is applicable in an application such as the present requires the court to determine whether there is a reasonable prospect that another court may come to a different conclusion to that reached in the judgment that is sought to be taken on appeal. As the respondents observe, the use of the word "would" in s 17(1)(a)(i) is indicative of a raising of the threshold since previously, all that was required for the applicant to demonstrate was that there was a reasonable prospect that another court might come to a different conclusion (see **Daantjie Community and others v Crocodile Valley Citrus Company (Pty) Ltd and another** (75/2008) [2015] ZALCC 7 (28 July 2015). Further, this is not a test to be applied lightly – the Labour Appeal Court*

has recently had occasion to observe that this court ought to be cautious when leave to appeal is granted, as should the Labour Appeal Court when petitions are granted. The statutory imperative of the expeditious resolution of labour disputes necessarily requires that appeals be limited to those matters in which there is a reasonable prospect that the factual matrix could receive a ***Woolworths Limited v Matthews*** *[1999] 3 BLLR 288 (LC) different treatment or where there is some legitimate dispute on the law (See the judgment by Davis JA in* ***Martin and East (Pty) Ltd v NUM*** *(2014) 35 ILJ 2399 (LAC), and also* ***Kruger v S*** *2014 (1) SACR 369 (SCA) and the ruling by Steenkamp J in* ***Oasys Innovations (Pty) Ltd v Henning and another*** *(C 536/15, 6 November 2015).'*

[18] In deciding this application for leave to appeal, I am also guided by the dicta of the Supreme Court of Appeal where it held in ***Dexgroup (Pty) Ltd v Trustco Group International (Pty) Ltd and others*** *2013 (6) SA 520 (SCA) at para 24 that: '…The need to obtain leave to appeal is a valuable tool in ensuring that scarce judicial resources are not spent on appeals that lack merit. It should in this case have been deployed by refusing leave to appeal.'"*

Analysis

[16] The Supreme Court of Appeal and the Labour Appeal Court has expressed its unequivocal view that leave to appeal should not be lightly granted. In fact, the quoted passages emphasis that leave to appeal should only be granted in matters that have merit. The appeal courts have expressed

that the test for leave to appeal to be granted, and a proper consideration of the test on the facts before Court, is "… *a valuable tool in ensuring that scarce judicial resources are not spent on appeals that lack merit."* See **Dexgroup** quoted above.

[17] To establish whether the applicant will have a reasonable success in another court, it is necessary to quote the factual background which is common cause between the parties. This is quoted from the reasons for judgment:

> *"[3] Prior to advancing my reasons for the findings, I deem it necessary to briefly sketch the background to this application. The applicant is a trustee of a trust which received several million rand from a donor. The money was earmarked to uplift the community, create employment opportunities and enable the community to become self-sustainable (paraphrased). In order to administrate the money, a community trust (the first respondent) was established.*
>
> *[4] As a part of the agreement for the trust to obtain its goals, the trustees were paid a once off payment in the amount of R20,000.00 on 30 November 2018. This payment was made by Lonplats Mining, and not the Trust. This payment was also made prior to Lonplats being sold to the second respondent. The applicant claims to be entitled to receive a monthly amount of money and prays that a declaratory order be made*

that the decision of the Trust to pay a once of amount of R20,000.00 is declared invalid and unlawful. The applicant furthermore prays for an order that the Trust must pay to the applicant remuneration of R20,000.00 per month retrospectively from February 2016 to May 2020, together with interest."

[18] The documents before Court indicated unequivocally that the main places of business and/or residential address of the respondents are in Gauteng, not in the North West Province. In addition, the parties to the trust deed agreed to a *domicilium* address in the trust deed on paginated page 52 in clause 36. This *domicilium* address is in Gauteng and not in the North West Province.

[19] Page 50 paragraph 34 of the trust deed specifies that the parties agree to resolve any dispute arising from the trust deed, by arbitration.

[20] The applicant argues that he is immune from a cost order for litigation against the trust. The applicant was not able to support this argument by identifying a clause in the trust deed where trustees would be indemnified when launching an action against the trust.

[21] It is unfortunate that the community uplifting program did not materialise in the success envisaged by the parties to the trust deed and the donor. It is regrettable that the trustees of the 1st respondent, of which the applicant is one, were not able to uplift the community, create employment opportunities and enable the community to become self-sustainable as provided for in the trust deed.

[22] The once-off payment of R20,000.00 (Twenty Thousand Rand) to the trustees (including the applicant) was made in November 2018 and, in the absence of becoming self-sustainable, the 1st respondent trust has now become dormant and has no money left from the donation.

Conclusion

[23] In relation to the issues of jurisdiction and arbitration, the parties were at liberty to choose the terms of the trust deed. When the trust deed was signed, the parties agreed to a *domicilium* address. This agreement cannot be unilaterally changed by the applicant in instituting legal proceedings in a court outside of the territorial jurisdiction of the court. I

cannot foresee that any other court would come to a different conclusion on this point *in limine.*

[24] The reasoning in relation to the arbitration clause follows the reasoning in relation to jurisdiction. The parties agreed to the trust deed and should be kept to their agreement. I do not foresee that any other court would come to a different conclusion on this point *in limine*.

[25] In my view, this application for leave to appeal is a desperate attempt by the applicant to flog a dead horse in high hopes that it will miraculously rise and walk.

[26] Granting leave to appeal would only result in the dead horse being flogged more. The common cause facts in the matter dictates against any application for leave to appeal to be entertained.

[27] In application of the test for leave to appeal, I am satisfied that the applicant has not made out a case for leave to appeal to be granted.

Cost

[28] The normal rule is that a successful party is entitled to his/her costs. I find no reason to deviate from the normal rule, and no reason to deviate from this normal rule has been advanced by any of the parties.

[29] The applicant in the leave to appeal should be ordered to pay the costs of the respondents in the application for leave to appeal.

Order

In the premise, I make the following order:

(iii) The application for leave to appeal is dismissed.

(iv) The applicant is to pay the costs of the application for leave to appeal incurred by the respondents.

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FMM REID
JUDGE OF THE HIGH COURT

NORTH WEST DIVISION MAHIKENG

DATE OF ARGUMENT: **2023-10-27**

DATE OF JUDGMENT: **2024-01-05**

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