IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

(1)	REPORTABLE:
(2)	OF INTEREST TO OTHER JUDGES:
(3)	REVISED:

Date: Signature: _____

CASE NO: 2021/25209

DATE: 28 MARCH 2024

In the matter between:

ANCHEN VENTER	First Applicant
ANCHEN VENTER N.O.	Second Applicant

and

ASTFIN (SA) (PTY) LIMITED	First Respondent
JOHANNES GEORGE VENTER	Second Respondent
JOHANNES GEORGE VENTER N.O.	Third Respondent
JONATHAN BARON N.O.	Fourth Respondent
SKIATHOS B2 PROPERTY INVESTMENTS CC	Fifth Respondent
NRB CAPITAL SOLUTIONS (PTY) LIMITED	Sixth Respondent
FOREST DAWN SYSTEMS (PTY) LIMITED	Seventh Respondent
NRB SERVICES (PTY) LIMITED	Eighth Respondent
SHELF INVESTMENTS NO. 32 (PTY) LIMITED	Ninth Respondent
NRB RENTAL SOLUTIONS (PTY) LIMITED	Tenth Respondent
SCRAP-N4 AFRICA (PTY) LIMITED	Eleventh Respondent
J KWADRANT (PTY) LIMITED	Twelfth Respondent
PLANET FINANCE CORPORATION (PTY) LIMITED	Thirteenth Respondent
SOUTH AFRICAN REVENUE SERVICE	Fourteenth Respondent

Coram: Ternent AJ

Heard on: 29 February 2024

Delivered: 28 March 2024

Summary:

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 email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be at 15h00 on 28 March 2024.*

JUDGMENT - LEAVE TO APPEAL

TERNENT, AJ:

[1] As referred to in my judgment, both applicants brought an application for leave to appeal dated 10 November 2022[1]. This application sought leave to appeal the order dismissing the contention that the application had become settled between the applicants and the first respondent.

[2] Subsequently, a further application for leave to appeal was delivered by the first applicant alone dated 2 October 2023.[2]

[3] Mr Thompson, who appeared in the application for leave to appeal, informed me that he was only representing the first applicant and had only been briefed with the second application for leave to appeal. He informed me that I should only have regard to the second application for leave to appeal and that he was limiting his argument to only one ground

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1 CaseLines, 037-1 to 037-4

2 CaseLines, 037-6 to 037-12

raised in the application for leave to appeal[3] and dealt with in his heads of argument, namely that in the face of the material disputes of fact the Court *"could rightfully (and should have) then and there have dismissed the application"*.

[4] In this regard reliance was placed on *Mashisane v Mhlauli*[4] which is authority for the well-known principle that in the face of existing disputes of fact an application may well be dismissed rather than being referred to evidence or trial.

[5] As submitted to me by both counsel, representing the respective respondents, the first applicant cannot appeal the reasons for an order but only the order itself to the extent that it is contended that the order is wrong. This is a trite principle succinctly set out in a number of cases and, also in *Mass Stores (Pty) Ltd v Pick n Pay Retailers (Pty) Ltd,* as follows*:*[5]

> *"[59] Therefore, assuming that Masstores establishes that this Court has jurisdiction and that it is in the interest of justice to grant leave, the appeal can only succeed if it is shown that the order issued was not supported by the facts on record and the application of the relevant law to them. A decision of a court is not overturned merely because wrong reasons were invoked to support it. In our law no appeal lies against reasons in a judgment.* [Footnote omitted] *Instead, the appeal lies against an order. Hence it often occurs that an appeal is dismissed but for reasons different from those advanced by the lower court whose judgment is the subject of an appeal."*

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[3] CaseLines, 037-7 at para 2

[4] (903/2022) [2023] ZASCA 176 (14 December 2023) at para [26]

[5] 2017 (1) SA 613 (CC) at para [59] and also *South African Reserve Bank v Khumalo* 2010 (5) SA 449 (SCA) and *Tecmed (Pty) Ltd v The Minister of Health* 2012 JDR 0821 (SCA)

[6] As succinctly captured by Mr Stadler the complaint appears to be that I should have dismissed the application "*earlier rather than later*". And logically having dismissed the application, the first applicant is armed with the very order that she sought.

[7] The first applicant did not seek leave to appeal the costs order that was made by me.

[8] To the extent that it is contended by the first applicant that there were material disputes of fact and that in the face thereof, I should have not ventured into determining these disputes this is simply incorrect. As set out in my judgment, the first applicant's case is misconceived and in the absence of *bona fide* disputes of fact, in accordance with the *Plascon-Evans* Rule, the version of the first respondent was not only probable but decisive of the application, and warranted a dismissal of the application. I do not agree that this Court simply rubberstamps a referral to trial without a consideration of the alleged disputes.

[9] As such, I am of the view that the application for leave to appeal is equally ill-considered and should not have been brought in the first place. The application for leave to appeal is unmeritorious as a result. Although not submitted in argument, but rather in Mr Thompson's heads of argument, there are also no compelling reasons for leave to appeal be granted, as provided in section 17(1)(a)(ii) of the Supreme Court Act. Furthermore, there is also no practical effect in overturning the order in the face of the concession.

[10] The test, as provided for in section 17(1)(a)(i) of the High Court Act, is that leave to appeal may only be granted where the Judge concerned is of the opinion that the appeal would have a *"reasonable prospect of success."*

[11] In this regard the Supreme Court of Appeal in ***Notshokovu v S***[6] confirmed that *"It is clear that the threshold for granting leave to appeal against the judgment of a High Court has been raised in the new Act. The former test whether leave to appeal should be granted was a reasonable prospect that another Court might come to a different conclusion. The use of the word "would" in the new statute indicates a measure of certainty that another Court will differ from the Court whose judgment is sought to be appealed against."*

[12] The Supreme Court of Appeal has explained that the prospects of success must not be remote, but there must exist a reasonable chance of succeeding. An applicant who applies for leave to appeal must show that there is a sound and rational basis for the conclusion that there are prospects of success.[7] An applicant must convince the Court on proper grounds that he has prospects of success on appeal and those prospects are not remote, but have a realistic chance of succeeding.

[13] More is required than a mere possibility of success, or that the case is arguable on appeal, or that the case cannot be categorised as hopeless.[8] In the decision of ***Dexgroup (Pty) Ltd v Trustco Group International (Pty) Ltd and Others***[9] Wallis, JA observed that a Court should not grant leave to appeal and indeed is under a duty not to do so where the threshold which warrants such leave has not been cleared by an applicant in an application for leave to appeal:

> *"[24] … 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*

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6 [2016] ZASCA 112 (7 September 2016)

7 ***Ramakatsa and Others v African National Congress and Another*** (724/29) [2021] ZASCA 31 (31 March 2021)

8 ***S v Smith*** 2012 (1) SACR 567 (SCA)

9 ***Dexgroup (Pty) Ltd v Trustco Group International (Pty) Ltd and Others*** 2013 (6) SA 520 (SCA)

case have been deployed by refusing leave to appeal."

[14] Accordingly, it is required of a lower Court that it act as a filter to ensure that the Appeal Court's time is spent only on hearing appeals that are truly deserving of its attention and that the test for the grant of leave to appeal should thus be scrupulously followed.

[15] Both counsel for the respondents sought that I make an order against the first applicant on a punitive scale, as I did in the main application.

[16] I am of the view that the application for leave to appeal has simply delayed the finality of the order that was given by me disposing of the main application once and for all. In the light of the decision to raise a number of ill-founded grounds of appeal, which were correctly not pursued by Mr Thompson, it seems to me that the respondents have been put to unnecessary time and costs, all of which could have been averted if this application for leave to appeal had not been brought or pursued.

[17] Mr Thompson submitted to me that a punitive costs order should not be granted in that, on reflection and a second opinion, the first applicant had been given sage advice, which she accepted, that the grounds raised were in the main inappropriate and argument should be limited to the ground raised above. This ground however, not only was not raised in the application for leave to appeal but in any event, also does not pass the threshold required. Perhaps, it would have been appropriate for the first applicant to have not proceeded at all.

[18] In these circumstances, I am of the view that the first applicant should bear the costs of this hapless application for leave to appeal on an attorney client basis. As oft quoted:[10]

[10] *In re Alluvial Creek* 1929 CPD 532 at 535

"An order is asked for that he pay the costs as between attorney and client. Now sometimes such an order is given because of something in the conduct of a party which the Court considers should be punished, malice, misleading the Court and things like that, but I think the order may also be granted without any reflection upon the party where the proceedings are vexatious, and by vexatious I mean where they have the effect of being vexatious, although the intent may not have been that they should be vexatious. There are people who enter into litigation with the most upright purpose and the most firm belief in the justice of their case, and yet whose proceedings may be regarded as vexatious when they put the other side to unnecessary trouble and expense which the other side ought not to bear. That I think is the position in the present case."

[19] Accordingly, I make the following order:

19.1 The application for leave to appeal is dismissed.

19.2 The first applicant is ordered to pay the costs of the first to thirteenth respondents on the attorney client scale.

P V TERNENT
Acting Judge of the High Court of South Africa
Gauteng Division, Johannesburg

HEARD ON:	29 February 2024
DATE OF JUDGMENT:	28 March 2024
FOR FIRST APPLICANT:	Mr C Thompson E-mail:
FOR SECOND APPLICANT:	No appearance
INSTRUCTED BY:	Mr Bihl Erasmus Motaung Inc. E-mail: emil@em.law.za / sonja@em.law.za
FOR FIRST RESPONDENT:	Mr E Kromhout E-mail: kromhout@law.co.za
INSTRUCTED BY:	TWB – Tugendhaft Wapnick Banchetti & Partners E-mail: oshy@twb.co.za / helen@twb.co.za / anabela@twb.co.za
FOR SECOND TO THIRTEENTH RESPONDENTS:	Mr S M Stadler
INSTRUCTED BY:	Adams & Adams Ms S Van Niekerk E-mail: Shani.vanniekerk@adams.africa