



**IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG LOCAL DIVISION, JOHANNESBURG**

Case No:067229/2023

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES /NO
(3)	REVISED: NO
	26 April 2024
	DATE

In the matter between:

CLINTON JAMES VAN NIEKERK

1st Applicant

STEPHEN GEORGE MAY

2nd Applicant

And

MAZETTI MANAGEMENT SERVICES (PTY) LTD

1st Respondent

AMMETTI HOLDINGS (PTY) LTD

2nd Respondent

JUDGMENT

NOKO J

Introduction.

[1] The applicants launched an application for leave to appeal the judgment and order I granted on 7 February 2024 in terms of which I found that Mr Stephen George May (*Mr May or second respondent*) does not have authority to act on behalf of Mr Clinton James Van Niekerk (*Mr Van Niekerk or first respondent*). I have also ordered the second respondent to pay the respondents' costs *de bonis propriis*.

Background.

[2] The background of this case has been comprehensively mosaicked in the judgment I penned and will not be regurgitated in this judgment. In brief, the respondents launched proceedings against the first applicant for several orders. The said application was served on the second applicant and Ms Karen Botha (*Ms Botha*), the first applicant's mother, pursuant to the respondents' application for substituted service granted by this division. The second applicant delivered notice to oppose and was served with rule 7 notice by the respondents challenging his authority to act on behalf of the first applicant and in response he filed an affidavit deposed to by Ms Botha, who stated that she does not have instructions from the first applicant but has personal knowledge of the issues raised in the application and is also acting as the mother to the first applicant.

[3] At that time, it was alleged by Ms Botha that the first applicant was in a witness protection program (*protection program*) and was kept at some mysterious venue. The first applicant was not accessible to depose to an affidavit in the opposition of the application instituted by the respondents and was also not able to give the mother or Mr May the mandate to act. Second applicant and Ms Botha, who is also a practising attorney, stated that the first applicant instructed Mr May to attend to all his matters whilst he was kept in the protection program. Ms Botha also stated in her affidavit that she was kept abreast by the director of the protection program of the status of the first applicant who was in the protection program.

[4] The second applicant was requested during argument to obtain an affidavit from the director (handler of the first applicant) confirming that the first applicant was indeed in the protection program and is also inaccessible. The handler informed both the second applicant and the first applicant's advocate over the phone that he cannot confirm or deny that the first applicant is under protection program. In addition, the handler stated that he does not give them permission to provide this court with his particulars. This conduct on the part of the handler I construed as bordering on contempt of court but it became clear that no one can tell this court that he knows where first applicant is and further that he is indeed he is under the protection program.

[5] I concluded that Mr May having failed to persuade me that the first applicant was in the protection program and was inaccessible the assertion to that effect is unsubstantiated and therefore unsustainable. It also follows that the submission that the first applicant could not give the second applicant authority as he is in witness protection is not based on any evidence. The second applicant therefore has failed to persuade me

that he has mandate or authority to act for the first applicant and further that he is liable for the costs personally.

[6] The applicants were aggrieved by my decision hence launched an application for leave to appeal on the basis that I should not have insisted that the second applicant should have been given a specific mandate to act as the second applicant has an attorney and client relationship with the first applicant. The second applicant had to act in the interest of the first applicant as the papers were served on him (through an order issued pursuant to application for substituted service) and which were also served on Ms Botha.

[7] In addition, the order that second applicant personally pay the costs was unjustified.

[8] The application is opposed by the respondents who contended that the second applicant has still failed to even prove that he has authority to act for the first applicant in the application now serving before me. His authority is based on the affidavit allegedly deposed to by the first applicant on 12 February 2024.¹

Submissions and Contentions.

[9] The applicants' counsel contended that I erred in concluding that the second applicant was required to have possessed of a specific mandate to act for the first applicant. The fact that he was acting on behalf of the first applicant in the matters pending in Durban and Randburg established an attorney and client relationship which suffices for the purpose of authority to act. In addition, the first applicant gave a general mandate before being taken into witness protection program to the second applicant to

¹ This 'affidavit' was deposed to two day after giving my order on 10 February 2024.

defend him in all matters associated with the matters instituted in Durban. In addition, the rule does not prescribe a format in which evidence needs to be presented to proof of authority.

[10] Further that it was not necessary for me to have requested the handler to provide an affidavit confirming that indeed the first applicant is in custody under protection program as the evidence presented by Mr May and Ms Botha was sufficient.

[11] The respondents in retort submitted that the judgment I delivered was unassailable and the second applicant failed to persuade the court that he has mandate to act on behalf of the first applicant.

[12] In addition, the involvement of the second applicant in this *lis* is limited to the order of costs *de bonis propriis* made against him. The Superior Court Act does not generally, sanction the launching of application for leave to appeal only in respect of the costs order. To this end, respondents submitted, the leave to appeal by the second applicant is unsustainable and should be dismissed with costs *de bonis propriis* on a scale between attorney and own client scale.

[13] Further that the second applicant has still failed to demonstrate that he hold a mandate to act on behalf of the first applicant in launching the application for leave to appeal. In response to a rule 7 notice served after launching of this application the second applicant submitted that he act on the basis of an affidavit which has been obtained from the first applicant which should not be accepted as it is not properly commissioned.

Legal principles and analysis.

[14] Section 17 of the Superior Court Act which provides that leave to appeal would be granted where the court is, *inter alia*, of the opinion that the appeal would have a reasonable prospect of success and/or further that the adjudication of the application to stay would be precedent setting.

[15] It has been held by several courts² (and is therefore trite) that the provisions of section 17 have introduced a higher threshold to be met in application for leave to appeal and the usage of the word ‘*would*’ require the applicants to demonstrate that another court would come to a different conclusion.

[16] The mere possibility of success, an arguable case or one that is not hopeless is not enough.³ There must be a sound, rational basis to conclude that there is a reasonable prospect of success on appeal⁴.

[17] The second applicant has failed to present authority for the position that a general mandate was sufficient to act for the first applicant. There is still no evidence to demonstrate that the first applicant was or is still in witness protection program and was unable to provide mandate. Both attorneys, Mr May and Ms Botha conceded that they did not have mandate or authority from the first applicant specifically with regard to the *lis* as he is not accessible and worse he was not even aware that there is an application

² *Mont Chevaux Trust v Tina Goosen & 18 Others* 2014 JDR 2325. *MEC for Health, Eastern Cape v Mkhitha* 2016 ZASCA (25 November 2016), *Acting National Director of Public Prosecutions and Others v Democratic Alliance: In Re Democratic Alliance v Acting Director of Public Prosecutions and Others* 2016 ZAGPPHC 489.

³ *MEC for Health, Eastern Cape v Mkhitha* 2016 ZASCA (25 November 2016) at para 17.

⁴ *S v Smith* 2012 (1) SACR 527.

against him. This is despite the fact that there is an affidavit which was deposed to by the first applicant authorising the institution of the application for leave to appeal.

[18] The document attached to the reply to the respondents' rule 7 notice has not been properly commissioned and reliance on it as an affidavit in support of the authority has no legal basis. The counsel for the applicants did not in retort submit that the said affidavit was properly commissioned or non-compliance with regulation on commissioning of document should be condoned. If no request for condonation is requested is made then none would be granted. It appears that the first applicant, second applicant and Ms Botha are all attorneys and are expected to know better especially as they are all commissioners of oaths. The said affidavit is therefore defective and not acceptable.

[19] In the premises the applicants have failed to demonstrate that the requirements set out in the Superior Court Act were satisfied and the application for leave to appeal is bound to be dismissed. Therefore, I find that no other court would come to a different conclusion.

Costs

[20] As it was held in the impugned judgment the second applicant has failed to persuade the court that he possesses authority from the first applicant to prosecute the application for leave to appeal. As the first applicant appears now to be accessible the second applicant should have done better.⁵ Absent the necessary authority no order can be made against the first applicant. I am unable to find fault in the request by the

⁵ The second applicant did not to inform the court as to how was the affidavit obtained from first applicant who was not accessible two days after the handler told the second applicant a day before that the first applicant is not accessible.

respondents that the second applicant should be ordered to pay costs personally at a punitive scale.

Order

[21] In the premises I grant the following order:

That the application for leave to appeal is dismissed with costs against the second applicant de bonis propriis on a scale between attorney and client.

M V Noko

Judge of the High Court

This judgement was 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 of the judgment is deemed to be **26 April 2024** at 14:00.

Date of hearing: 23 April 2024

Date of judgment: 26 April 2024

Appearances

For the Applicants: Adv Willis SC.

Attorneys for the Applicants: Stephen g May Attorney.

For the Respondents: Adv N Riley

Attorneys for the Respondents: Darryl Furman & Associates