



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

Case No: 000183/2024

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

28/02/2024

DATE

SIGNATURE

RIGHTPLAY BUSINESS REHABILITATION (PTY) LTD

Applicant

and

TRANSNET SOC LTD

Respondent

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 28 February 2024.

LEAVE TO APPEAL: JUDGMENT

PHOOKO AJ

INTRODUCTION

[1] This is an application for leave to appeal to the Supreme Court of Appeal/Full Bench against my judgment granted on 30 January 2024.

[2] Section 17(1) of the Superior Courts Act, Act 10 of 2013 ("the Superior Courts Act"), regulates applications for leave to appeal and provides:

'(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;

(b) the decision sought on appeal does not fall within the ambit of section

16(2)(a); and (c) 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.'

[3] The test in an application for leave to appeal before the promulgation of the Superior Courts Act was whether there were reasonable prospects that another court may come to a different conclusion. However, this is no longer the position. Section 17(1)(1) of the Superior Courts Act has raised the bar. In *The Mont Chevaux Trust v Tina Goosen & 18 Others*¹ it was held that:

'It is clear that the threshold for granting leave to appeal against a 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, see *Van Heerden v Cornwright & Others* [1985 \(2\) SA 342](#) (T) at 343H. 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.'

[4] Consequently, in considering the application for leave to appeal this Court must remain cognizant of the higher threshold that needs to be met before leave to

¹ 2014 JDR 2325 (LCC) at para 6.

appeal may be granted.² There must exist more than just a mere possibility that another court will, and/or not might, find differently on both facts and law.³

- [5] In so far as the leave to appeal against my judgment, I have carefully considered the written and oral submissions of the parties including what now appears to be the applicant's main submission to the effect that the court *a quo* did not deal with the remedy that was sought relating to an interdict and/or that the court *a quo* overlooked the interdict sought by the applicant as per the notice of motion.
- [6] I need to mention that counsel who was involved in the main application mostly devoted his arguments to *Mandament van spolie* remedy. The counsel involved in the execution of the appeal is of the view that "*even if it were to be accepted that the court a quo rightly or wrongly so upheld the points in limine, it still ought to have dealt with the interdict sought*". In other words, counsel argued that the absence of any reference to an interdict shows that the court *a quo* overlooked this aspect.
- [7] The respondent rehashed its arguments as made in the court *a quo* to the effect that the applicant *inter alia* pursued an incorrect form of remedy.
- [8] I somehow understand the applicant's concern in that a detailed judgment provides both litigants with a clear picture of how a court arrived at its conclusion. However, I need to point out that the applicant's criticism of the court *a quo* not to mention every single issue raised before it is thus misplaced. It must be remembered that:

'Indeed, even in a written judgment it is often impossible, without going into the facts at undue length, to refer to all the considerations that arise. Moreover, even the most careful Judge may forget, not to consider, but to mention some of them. In other words, it does not necessarily follow that, because no mention is made of certain points in a judgment - more especially, of course, if that judgment be an oral one and an *ex tempore* one - they have not been taken into account by the trial Judge in arriving at his decision. No judgment can ever be perfect and all-embracing. It would be

² See *Fair-Trade Independent Tobacco Association v President of the Republic of South Africa and Another* [2020] ZAGPPHC at para 6.

³ *Ibid.*

most unsafe invariably to conclude that everything that is not mentioned has been overlooked' (own emphasis added).⁴

[9] Consequently, "... *it does not necessarily follow that, because something has not been mentioned, therefore it has not been considered*".⁵ In light of the above exposition, I am of the view that the issue related to an interdict was considered.

[10] I am of the view that the applicant is incorrect to suggest that the court *a quo* only relied upon non-joinder and *locus standi* to dismiss the main application. A simple reading of the judgment of the court *a quo* also reveals otherwise as the application was also dismissed on the basis that the "*applicant relied on an incorrect remedy in law*".⁶ Notwithstanding this, I have carefully considered the applicant's submissions concerning *Maistry v Naidoo and Another*⁷ especially where it states that:

'the respondent does not identify any authority, and I am not aware of any, in support of the proposition that a failure to cite a non-spoiling and non-possessing owner of the spoliated property [does not] constitutes a fatal non-joinder in a spoliation application'.

[11] In light of the above, I am of the view that the applicant's arguments only in so far as they relate to non-joinder in a spoliation application have merit and that another court will come to a different conclusion.

ORDER

[12] I, therefore, make the following order:

- (a) The application for leave to appeal to the Full Bench is granted.
- (b) Costs of the application for leave to appeal to be costs in the appeal.

⁴ *Rex v Dhlumayo and Another* 1948 (2) SA 677 (A), at page 702 A-B

⁵ *Ibid.*

⁶ See paras 38-40 of the judgment of the court *a quo*.

⁷ [2022] ZAGPJHC 937 at para 9.

M R PHOOKO
ACTING JUDGE OF THE HIGH COURT,
GAUTENG DIVISION, PRETORIA

APPEARANCES:

Counsel for the Applicant:	Adv E Muller
Instructed by:	Elliott Attorneys
Counsel for the Respondent:	Adv W Maodi
Instructed by:	Majang Attorneys Inc
Date of Hearing:	22 February 2024
Date of Judgment:	28 February 2024