

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

Case No: 25412/22

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED

SIGNATURE:

DATE: 11 APRIL 2023

In the matter between:

CHABELI MOLATOLI ATTORNEYS INCORPORATED

Applicant

and

**POLO SUSAN PITSO (N.O.)
(IN HER CAPACITY AS EXECUTRIX OF
LATE LIKANO JOHN PITSO)**

First Respondent

POLO SUSAN PITSO

Second Respondent

LIPALES A PITSO

Third Respondent

TLOTLISO PITSO

Fourth Respondent

MASTER OF THE HIGH COURT (PRETORIA)

Fifth Respondent

SELEKA ATTORNEYS

Sixth Respondent

JUDGMENT (LEAVE TO APPEAL)

NDLOKOVANE AJ

INTRODUCTION

[1.] The unsuccessful respondents (first to fourth respondents) in the main application now seek leave to appeal against the whole of my judgement and order granted on 06 October 2022. They seek an order in the following terms:

“1. The leave to appeal succeeds with costs, including costs of two Counsel, to be paid by the Applicant/Respondent.

2. Paragraphs 1 and 2 of the Order of the Court a quo is set aside and replaced with an order in the following terms:

‘1. Susan Polo Pitso's decision made on 28 April 2022 to terminate a mandate of agency previously made and entered into between Susan Polo Pitso and the Applicant on 18 November 2021, is declared valid;

2. The Applicant is ordered to pay the First to Fourth Respondents taxed or agreed costs on an attorney and own client scale, consequent the employment of Counsel.’”

[2.] In support of the application for leave to appeal, the respondents rely on a number of grounds. These grounds can be conveniently grouped into (2) two categories, both factual and legal as follow:

“1. No factual findings made in the entire impugned Judgment to distinguish that the termination of a mandate of agency was executed by Second Respondent as opposed to the First Respondent (which is the same person) on 28 April 2022 to sustain an order that such termination was unlawful.

2. The grounds of appeal that constitute a compelling reason for the appeal to be heard in terms of Section 17(1)(a)(i) read with (ii) of the Superior Courts Act, Act 10 of 2013 (the ACT) are the legal issues hereinunder:

2.1. The Learned Honourable Acting Judge N Ndlovane erred in declaring that the termination of Applicant's mandate is unlawful.

- 2.2 *The Judgement of the Honourable Acting Judge Justice N Ndlovane, handed down in the Gauteng Division of the High Court, Pretoria, on 6 October 2022 does not dispose of all the issues, and thus the appeal would lead to a just and prompt resolution of the real issues between the parties.*
- 2.3 *This is so simply because, the Honourable Acting Judge Justice N Ndlovane makes an order that the termination of the Applicant's mandate is declared unlawful in the absence of any factual finding based on evidence to the effect that it was indeed the Second Respondent and not the First Respondent as contended to by the Applicant, who terminated a mandate of agency previously made and entered into between Susan Polo Pitso in her capacity as an heir and not in her capacity as an executrix of the late estate of Likano John Pitso as duly appointed as such on 30 December 2021.*
- 2.4. *The foregoing is notwithstanding the fact that the Applicant during the subsistence of the contract of mandate has at all material times dealt with Susan Polo Pitso and taking instruction from her without any enquiry as regards to in what capacity she was acting; and in the absence of any written instruction or otherwise from her containing the words "in my capacity as an executrix of the late estate of Likano John Pitso".*
- 2.5 *There was no evidence as such at the hearing of this matter from which the above Honourable Court could have reasonably concluded in what capacity Susan Polo Pitso was acting whilst either concluding or terminating the mandate of agency. The decision of his Lordship Honourable Mr Justice Makhoba during the urgent hearing of this matter on 24 March 2022 conflicts with paragraph 1 of the order.*
- 2.6. *In our law, generally a principal may freely terminate the authority conferred upon an agent, even if the mandate purports to be*

irrevocable. This is so simply because, in the latter instance, the principal may be liable for damages for breach of contract, but the erstwhile agent may no longer bind the principal.

2.7 *At the hearing of this matter set down on an urgent motion roll on 24 May 2022, his Lordship, the Honourable Mr. Justice Makhoba found that the principal is entitled to revoke a mandate of urgency at will, and that this was simply so because, it would be against public policy, to coerce a principal into retaining an individual as his agent, when he no longer wished to retain him as such.*

2.8 *To the extent that there is a conflicting decision of his Lordship, the Honourable Mr Justice Makhoba stating that the principal is entitled to revoke a mandate of urgency at will, and that this was simply so because, it would be against public policy, to coerce a principal into retaining an individual as his agent, when he no longer wished to retain him as such, there is a compelling reason that the appeal does have a reasonable prospect of success because of conflicting judgments.”*

[3.] The applicant subsequently filed a cross leave to appeal application to apply for leave to appeal to the Supreme Court of Appeal. Alternatively, the full bench of this division against the judgment that I delivered on the 6th October 2022, for the following grounds:

“1. The Learned Acting Judge erred in her judgment in which:

1.1 *the Ladyship acting judge in her judgment made in favour of the appellant erred by failing to make the findings in relation to the conduct of the second respondent, and the unlawful termination of the applicant mandate, while in her order the honourable acting Judge made reference to her finding above in order one (1) of her judgment, the purpose of this appeal in this regard is to ensure that the judgment reflects the correct intention of the honourable court in this regards.*

- 1.2 *The Learned Acting Judge erred in failing to make the findings of fact and law on the uncontested evidence placed before the honourable court on the unbecoming conduct of the first and second respondent in failing to distinguish her persona to that of nomine officio in which the first respondent was appointed as, in terms of the administration of the deceased estate Act by the master; to administer the deceased estate in accordance with the prescripts of the administration of the deceased estate Act.*
- 1.3 *The Learned Acting Judge erred by not considering that the first and second respondent acted in the manner to siphon off the estate assets of the estate to herself in detriment to the creditors of the estate, by lying to one of the creditors that there is no estate of the deceased, as well as trying to transfer the deceased and estate vehicle in her own name before the estate could be approved by the master.*
- 1.4 *The learned acting Judge erred by not considering that the first and second respondent mislead this court on her answering affidavit by deliberately misleading the court that the value of estate is R300 954 (three hundred thousand nine hundred and fifty-four rand) while the contrary is the same as the papers before the court and as submitted when the estate was reported the inventory value is at over R7 million rand (seven million rand).*
- 1.5 *The learned Acting Judge erred in her judgment paragraph 19 in considering the relationship between the heirs and the executrix, paragraph which reads as follows: "Bad relationship between the heirs and executor cannot lead to the removal of the executor unless it is probable that the administration of the estate would be prevented as a result, but in my view, in such event, the respective actions of the heir and executor must be considered, for their cannot be allowed to frustrate, through unreasonable and wrong conduct, the actions of an executor which is beyond reproach. A disgruntled heir cannot be allowed to circumvent the administration process by improperly*

pressurizing the executor to accede to his demands. To remove an executor in such circumstances would not serve any purpose for the same lot would befall the next executors well.”

[4.] The applicants further submit that should the leave for cross appeal be granted and the appeal court finds in the applicant’s appeal on the issue of removal of the executrix, then the agency mandate terms will be enforced by Supreme Court of Appeal. In contrast, the respondent in its heads of arguments contends that prior to the judgement in the main application being delivered, the applicant’s mandate of agency was terminated by the first respondent through the letter addressed to the applicant. To the extent that the applicant lacks the necessary locus standi to bring any application before this court This letter was unfortunately not before me for obvious reason. Therefore, the respondent submits that the applicant’s *locus standi* in launching the cross appeal is no more.

The test in an application for leave to appeal

[5.] Applications for leave to appeal are governed by ss 16 and 17 of the Act. Section 17 makes provision for leave to appeal to be granted where the presiding judge is of the opinion that either the appeal would have a reasonable prospect of success or there is some other compelling reason why the appeal should be heard, including whether there are conflicting judgments on the matter under consideration.

[6.] Reasonable prospect of success has previously been defined to mean that there is a reasonable possibility that another court may come to a different decision.

[7.] With the enactment of s17 of the Act, the test has now obtained statutory force and is to be applied using the word ‘*would*’ in deciding whether to grant leave or not. In other words, the test is would another court come to a different decision. In the unreported decision of the ***Mont Chevaux Trust v Goosen & 18 others***¹, the

¹ 2014 JDR 2325

Land Claims Court held, *albeit obiter*, that the wording of the subsection raised the bar for the test that now has to be applied to any application for leave to appeal.

[8.] The court in ***Muhanelwa v Gcingca (4713/2017) (2018) ZAGPJHC 718(27 February 2018); (2019) JOL 43605 (GJ) para 15-16***, where De Villiers AJ stated:

“I am mindful that the test of appeal should not be applied so strictly that the important and necessary procedural safeguard against judicial error is not rendered nugatory. Striking the right balance where Parliament has used such an obligatory formulation to limit appeals, is not easy. I have not been addressed on case authority as to based on what factors, save for the stipulated “conflicting judgements on the matter under consideration”, a court could find that ‘there is some compelling reason why the appeal should be heard’ in circumstances where the appeal lacks prospects of success. The clear intent in section 17 of the Superior Court’s Act is to limit appeals. In my view a proper application of section 17(1)(a)(ii) would exclude leave to appeal (in the absence of some other compelling reasons) where the alleged conflicting judgement are distinguishable (and therefore are not judgements on the matter under consideration), and the alleged conflicting judgements are in conflict with authority binding on those courts. In my view such judgements by lower courts are not binding judgements and section 17(1)(a)(ii) must be interpreted to refer to binding judgements that have not been overruled or that failed to apply authority binding on those courts.”

The status of the affidavits before the court a quo

[9.] There was some debate before this Court as to the effect of the admission of the affidavits filed on behalf of the respondent in the main application. As I understood the position of counsel for applicant, Mr Moodley, same resulted in the applicant filing a further replying affidavit in the main application. I directed the parties to furnish the court with the transcripts on timeframes convenient to them.

[10.] I am indebted to both parties; the transcripts were filed within the agreed timeframes. On careful consideration of the transcript, it was evident that I made a

ruling in this regard during the hearing of the main application. This ruling is clearly reflected at paragraph 20 of the transcript.

[11.] In the light of this approach to the affidavits the court *a quo* determined that no particular regard will be had to the contents of those affidavits outside the parameters considered by the court in the main application. Therefore, this position remains unchanged.

[12.] In the present matter, I would have to determine whether another court *would* (my emphasis) come to a different decision.

[13.] The order I granted as reflected in paragraph 20 of the judgement I handed down on 06 October 2022 states:

“1. The termination of applicant’s mandate is declared unlawful.

2.....”

[14.] I have considered the grounds of appeal in conjunction with the findings made in the entire judgement in this regard. This consideration brings me to a determination that another court would differ with me. In that, the second respondent who is the wife of the late Mr. Likano John Pitso is cited first in her capacity as an executrix of her late husband’s estate and in her personal capacity therefore factual findings on the party who terminated the mandate of agency ought to have been pronounced prior to a determination of its lawfulness or not. Thus creating a clear distinction between the first and second respondents. Consequently, on this point alone, the application for leave to appeal must succeed.

[15.] Regarding the respondent’s reliance on the judgment of Makhoba J dated 24 May 2022 in this regard is misplaced because:

- 1.1. Makhoba, on the 24 May 2022, merely struck the matter from his urgent roll for lack of urgency with costs. This is evident in his order situated at caselines bundles 0332-1. In so doing, the applicant enrolled the matter

on the opposed motion roll which was heard by me on the week of 26 July 2022.

- 1.1.1. Therefore Makhoba J by ruling as above stated, rendered the matter to lack the essential features of a judgement or order, as it is not final in effect, nor is such a ruling definitive of the rights between the parties. Further, it does not dispose of a substantial portion, or indeed any, of the relief sought in the main application.
- 1.1.2. Consequent, his findings on termination of a mandate of agency as relied on by the respondents ought not to be understood as findings but merely remarks in passing(*obiter dictum*),as there was no order made on the merits in this regard.
- 1.1.3. Regarding the cross appeal and the grounds thereof, I am of the view that another court would differ with me and therefore the cross appeal must also succeed for the same reasons advanced above regarding the leave to appeal. For these reasons alone, I need not deal further with the remaining grounds in both these applications.
- 1.1.4. Since both applications are inextricably linked, I am of the view that it is eminently convenient for them to be heard by the SCA.

ORDER

[15.] In the result, the following order is granted:

1. The first to fourth respondent's/appellants application for leave to appeal is granted to the Supreme Court of Appeal.
2. The applicants' cross leave to appeal to the Supreme Court of Appeal is granted.
3. Costs shall be costs in the appeal.

N NDLOKOVANE AJ
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Delivered: this judgment was prepared and authored by the judge whose name is reflected and is handed down electronically and 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 handing down is deemed to be 11 April 2023.

APPEARANCES

FOR THE APPLICANT:	ADV. C MOLATOLI
FOR THE FIRST TO FOURTH RESPONDENTS:	ADV R.M MAHLATSI
	ADV O. TOMMY
HEARD ON:	17 FEBRUARY 2023
DATE OF JUDGMENT:	11 APRIL 2023