



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

Case No: 886/2021P

In the matter between:

FIT 24 GYMS PROPRIETARY LIMITED
[Registration Number: 2017/240255/07]

FIRST APPLICANT

MAREK STEFAN BURCZAK

SECOND APPLICANT

and

TOWER PROPERTY FUND LIMITED
[Registration Number: 2012/066457/07]

RESPONDENT

Coram: Mossop J

Heard: 7 March 2023

Delivered: 9 March 2023

ORDER

The following order is made:

The application for leave to appeal is dismissed with costs.

JUDGMENT

MOSSOP J:

[1] This is an application for leave to appeal against a judgment that I delivered on 28 November 2022 after hearing argument in an opposed motion (the opposed motion). I granted judgment in favour of the respondent in this application for payment of the amount of R4 001 328.85, interest thereon and costs. This application is brought at the instance of the first and second respondents in the opposed motion and for the purposes of this application, I shall refer to them now as 'the applicants'. It follows that the applicant in the opposed motion shall now be referred to as 'the respondent'.

[2] As in the opposed motion, Mr Reddy appeared for the applicants and Mr Schaup appeared for the respondent. Both counsel are thanked for their respective contributions.

[3] Before dealing with the merits of the application, I need to explain why it has taken so long to hear this application. It is my habit to hear applications for leave to appeal as soon as practically possible after they have been filed. This application was delivered on 15 December 2022, after the end of the judicial year and when the court was in its end of year recess period. I was, however, on recess duty commencing on 8 January 2023 and received the notice of application on that day. Unfortunately, I could not thereafter immediately deal with the application during the first session of the first term of 2023 as I was assigned circuit court duties in Madadeni in Northern KwaZulu-Natal. I returned from such duties two weeks ago but there was then difficulty in arranging a date convenient to both counsel. This explains why this application has not been heard as swiftly as it should have been.

[4] As was pointed out by Mr Reddy in his argument, section 17 of the Superior Courts Act, 10 of 2013 (the Act) regulates applications for leave to appeal from a decision of a High Court. It provides as follows:

‘(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.’

[5] Prior to the enactment of the Act, the applicable test in an application for leave to appeal was whether there were reasonable prospects that an appeal court may come to a different conclusion than that arrived at by the lower court. The enactment of the Act has changed that test and has significantly raised the threshold for the granting of leave to appeal.¹ The use of the word ‘would’ in the Act indicates that there must be a measure of certainty that another court will differ from the court whose judgment is sought to be appealed against. This was acknowledged by Mr Reddy in his argument.

[6] Leave to appeal may thus only be granted where a court is of the opinion that the appeal would have a reasonable prospect of success, and which prospects are not too remote.² As was stated by Schippers JA in *MEC for Health, Eastern Cape v Mkhitha and Another*³:

‘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.’

[7] My judgment against which leave to appeal is sought is comprehensive and I stand by the reasons set out therein. I have, however, considered the respective arguments, authorities and submissions of both counsel in proposing and resisting leave to appeal. In particular, the submissions of Mr Reddy gave me pause for thought and I

¹ *Public Protector of South Africa v Speaker of the National Assembly and Others* (8500/2022) [2022] ZAWCHC 222 (3 November 2022) para 14.

² *Ramakatsa and Others v African National Congress and Another* [2021] JOL 49993 (SCA) para [10]

³ *MEC for Health, Eastern Cape v Mkhitha and Another* [2016] ZASCA 176 para 17.

accordingly deemed it prudent to reserve judgment in order to give me the opportunity to fully consider those submissions and assess their significance. I have now done this.

[8] As was submitted by Mr Schaup in argument, many of the points taken in the answering affidavit in the opposed motion were abandoned and not persisted in when the matter was argued. In addition, certain points were argued by Mr Reddy in the opposed motion but were not mentioned when this application for leave to appeal was heard nor are they accommodated in the notice of application for leave to appeal. I refer in this regard to the issue of the attestation of the respondent's founding affidavit by a Mr Rivaaj Singh. I shall assume that this is not a ground upon which that the applicants rely in seeking leave to appeal (it was, in my view, satisfactorily resolved on the papers before argument was heard in the opposed motion).

[9] The notice of application for leave to appeal sets out the grounds that the applicants rely upon. I shall briefly consider each of them, *seriatim*:

(a) The first ground of appeal

The first ground of appeal is that I erred in finding that the respondent was permitted to rely upon the first application brought by the respondent and which was launched on 15 February 2021. It is perhaps necessary to mention that in terms of an agreement of lease (the lease agreement), the respondent was the first applicant's landlord. The first respondent conducted the business of a gymnasium at the respondent's premises, but fell into arrears with its rental payments. This led to an application for a money judgment being brought against the applicants by the respondent (the first application). The first application, which was not opposed by the applicants, led to the conclusion of a settlement agreement (the settlement agreement). Thereafter, another application, the second application, was brought when the first applicant defaulted on its obligations arising out of the settlement agreement and also defaulted on its continuing obligations to the respondent, the lease agreement not having been cancelled after the institution of the first application or after the conclusion of the settlement agreement. I did not at any stage rely upon the first application to conclude that the respondent was entitled to the relief that it claimed. The first application underpinned the conclusion of the settlement agreement and had never been withdrawn, but obviously that application had been resolved by the consensual

conclusion of the settlement agreement. The first ground of appeal is thus unpersuasive.

(b) The second ground of appeal

The second ground of appeal appears to comprise an allegation that I erred in concluding that the settlement agreement was effective but still found that the respondent was not precluded from reverting to its original cause of action, namely the lease agreement. Clauses 8.1 and 8.2 of the settlement agreement provided as follows:

‘8.1 This Agreement is not a novation of the original debt obligation owed by the Tenant to the Landlord in terms of the Lease Agreement.

8.2 It is therefore recorded that, in the event of that the tenant and/or the Guarantor breach any of the terms of this Agreement and fails to remedy such breach as per clause 9 below, the full amount of the original obligation in the sum of R2,172,991.38 together with interest at the prescribed legal rate *a tempore morae* until date of payment, shall immediately become due and payable by the Tenant to the Landlord.’

The provisions of the settlement agreement refute this ground of appeal.

(c) The third ground of appeal

The third ground of appeal is that I erred in permitting the respondent to claim future amounts under case number 886/2021P in the light of the settlement agreement. This is a point that I explored with Mr Reddy both during argument in the opposed application and in this application. It is also canvassed in some detail in my judgment. The settlement agreement determined the liabilities of the first applicant to the respondent at a certain point in time. It did not determine those liabilities for all time. In the light of the fact that the lease continued to run, the first applicant would continue to incur obligations to the respondent in the future. In the event of those future obligations not being met, there is, in my view, no bar to the respondent claiming both the past obligations, dealt with by the settlement agreement, and the future obligations that obviously do not fall within the purview of that agreement. Sight must not be lost of the fact that the respondent claimed these amounts in a fresh application, the second application, although still under the case number 886/2021P, and it did not simply rely on the first application that led to the conclusion of the settlement agreement. This ground of appeal is also unpersuasive.

(d) The fourth ground of appeal

The fourth ground of appeal appears to suggest that I erred in concluding that the fact that the parties executed an addendum to the settlement agreement rendered the settlement agreement not to be in full and final settlement of the first applicant's obligations to the respondent. I came to no such finding. The addendum merely led to the revision of the amount claimed by the respondent. But the fact that the parties described the settlement agreement as being in full and final settlement did not mean, as stated above, that the first applicant would not incur any future obligations to the respondent or that the respondent would not be able to claim those obligations where they remained unpaid. There is no merit in this ground of appeal.

(e) The fifth ground of appeal

The fifth ground of appeal is that I erred in failing to acknowledge that the respondent admitted that the first applicant had been complying with its obligations in terms of the settlement agreement and the addendum. The respondent, in fact, stated the following:

'First Respondent has failed to comply with its obligations in terms of the Order and in particular its repayment obligations in terms of the Settlement Agreement, as amended by the Addendum.'

This ground of appeal, accordingly, holds little attraction.

(f) The sixth ground of appeal

The sixth ground of appeal is that I erred by placing reliance on the certificate of balance put up by the respondent as it was rendered unreliable by virtue of the fact that it included amounts levied against the first applicant's account by the respondent in respect of legal costs. Mr Schaup conceded when the opposed motion was argued that such costs ought not to appear in the certificate of balance and undertook the mathematical exercise of recalculating the amount claimed by the respondent. The amount claimed was, thus, substantially reduced. As a matter of fact, I did not rely on the certificate of balance but I relied upon the mathematical recalculation performed by Mr Schaup. Mr Reddy was satisfied with the accuracy of that calculation but, as was stated in the judgment, did not admit that applicants were, in fact, liable to the respondent in that amount. The quantum of the indebtedness was not disputed in the papers, save for the allegation that it impermissibly included legal costs and interest

on those costs. Those charges were removed from the calculation and it is upon the sum of that calculation, performed by Mr Schaup, that I arrived at the judgment amount. This ground of appeal is accordingly misplaced.

(g) The seventh ground of appeal

The seventh and final ground of appeal deals with an allegation that I erred in failing to uphold an allegation that the respondent no longer existed and therefore lacked *locus standi in judicio*. There was no evidence adduced in this regard. There is no reference to such a point in the answering affidavit. As Mr Schaup points out, it first appeared in the heads of argument delivered by the applicants. There is, however, a chain of emails attached to the answering affidavit. In the last email attached, the following statement appears:

‘As discussed, Tower has been acquired by RDC Property Group.’

Based upon these brief words, an alternative scenario was created by the applicants and advanced only in argument that culminated in the following statement in the appearing in the applicants’ notice of application for leave to appeal:

‘. . . RDC Property Group has acquired the Respondent, as such the respondent ceased to exist.’

Such a conclusion is a *non sequitur*. Acquisition does not automatically lead to the demise of the entity acquired. It was further argued by Mr Reddy that the RDC Property Group now owns all the assets of the respondent. That may be so. If it is so, it has no bearing on the applicants’ obligations to the respondent. The point has no prospects of succeeding.

[10] After a thorough consideration of the grounds upon which leave to appeal is sought, I remain unpersuaded that there are reasonable prospects that another court would come to a different conclusion than the one to which I came, this being particularly so given the facts that I found to be established and given the increased threshold that applications for leave to appeal now face.

[11] The purpose behind requiring litigants to obtain leave to appeal and not simply allowing an automatic right of appeal to exist in every matter was set out in the matter

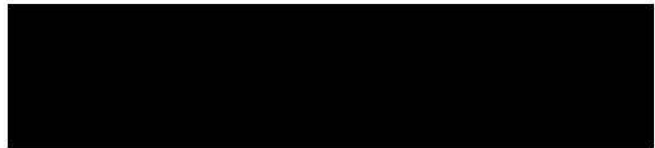
of *Dexgroup (Pty) Ltd v Trustco Group International (Pty) Ltd*,⁴ where Wallis JA said that:

'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.'

[12] In my view, if leave to appeal were to be granted in this matter, the appeal would fall within the classification described by Wallis JA.

[13] I accordingly make the following order:

The application for leave to appeal is dismissed with costs.



MOSSOP J

⁴ *Dexgroup (Pty) Ltd v Trustco Group International (Pty) Ltd* 2013 (6) SA 520 (SCA) para 24.

APPEARANCES

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Date of Hearing : 7 March 2023

Date of Judgment : 9 March 2023