

**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Case number: 6673/2023

In the application between:

BARBARA JILL LESLIE

Applicant

and

ROGERIO VIANA

First Respondent

(together with all other occupiers holding under the first respondent)

**ALL OTHER UNLAWFUL OCCUPIERS OF
SECTIONS 5 AND 17 OF THE SECTIONAL
SCHEME MONTE CARLO FLATS (SS NO. 7/1979),
CAMPS BAY**

Second Respondent

(together with all other occupiers holding under the first respondent)

THE CITY OF CAPE TOWN

Third Respondent

Date of hearing: 13 March 2024

**JUDGMENT – APPLICATION FOR LEAVE TO APPEAL –
DELIVERED ELECTRONICALLY ON 13 MARCH 2024**

HOLDERNESS AJ

[1] For convenience, the parties will be referred to as in the main application.

[2] On 31 January 2024 I handed down judgment in terms of which the first respondent was ordered to make payment of the amount of R97,200 in respect of arrear rental, and to pay the applicant's costs, including all reserved costs, on the scale as between attorney and client.

[3] On 12 February 2024 the first respondent delivered a notice of appeal, supported by an affidavit deposed to by him on the same date.

[4] On 21 February 2024, a further document titled "*LEAVE TO APPEAL*" was delivered, dated 12 February 2024.

[5] There is no application for leave to appeal before the Court, as required by the provisions of Uniform Rule 49(1)(b).

[6] However, and as the first respondent appears in person, to avoid any undue delays and the incurrence of unnecessary costs, I will approach this matter as an application for leave to appeal and, to the extent necessary, the first

respondent's failure to comply with the provisions of Rule 49(1)(b) is condoned.

[7] It appears that the first respondent seeks leave to appeal against:

7.1 The interdictory relief granted on 12 May 2023 ('the May order');
and

7.2 The costs order granted on 31 January 2024 ('the costs order').

[8] In terms of Section 17(1)(a)(i) of the Superior Courts Act, 10 of 2013 ('the Act'), for the first respondent to successfully pursue leave to appeal, he needs to show that his appeal would enjoy a reasonable prospect of success.

[9] With the enactment of section 17 of the Act, the threshold for granting leave to appeal has been raised. The use of the word 'would' in the Act imposes a more stringent threshold in terms thereof, compared to the provisions of the repealed Supreme Court Act 59 of 1959.

[10] In *Mount Chevaux Trust [IT 2012/28] v Tina Goosen and 18 Others*,¹ Bertelsmann J stated as follows:

'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

¹ 2014 JDR 2325 (LCC).

court may come to a different conclusion, See *Van Heerden v Cronwright and 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.'

....In the decision of *Dexgroup (Pty) Ltd vs Trustco Group International (Pty) Ltd and Others*² 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. Paragraph 24 of the judgment he held as follows:

"...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 case have been deployed by refusing leave to appeal."

[11] Turning now to the present matter. The May order was granted by agreement between the applicant and the first respondent, and provided *inter alia* for:

11.1 Interim interdictory relief, issued by way of a rule *nisi* and with a return date on 9 June 2023;

11.2 An order that the first respondent vacate the applicant's property by 31 July 2023, and an eviction by the sheriff if he failed to do so; and

² 2013 (6) SA 520 (SCA) at para 24.

11.3 The relief pertaining to arrear rental and costs stood over for later determination.

[12] On 9 June 2023, a further agreed order was granted and the rule *nisi* was extended to 23 November 2023.

[13] The first respondent vacated the applicant's property on 30 June 2023. This caused the interdictory relief in the form of the rule *nisi* issued in terms of the May order to become

moot before 23 November 2023.

[14] In the circumstances, the applicant did not pursue a confirmation of the rule *nisi* on 23 November 2023, and no order was granted pertaining to interdictory relief in the judgment of 31 January 2024.

[15] The only issues which remained for determination to be determined by this Court on 23 November 2023 were the applicant's claim for arrear rental and costs.

[16] As affirmed in *International Trade Administration Commission v SCAW*

South Africa (Pty) Ltd,³ an appeal lies against an order of a Court. As there is no existing order for interdictory relief, there can be no appeal in respect of the interim interdict.

[17] Therefore to the extent that the first respondent seeks leave to appeal against the May order, such application in my view has no prospect of succeeding.

[18] Insofar as the appeal against the costs order is concerned, it is trite that a costs order is the result of an exercise of a judicial discretion by the Court hearing a case. It is a so-called 'true discretion,' as when an award of costs is made against one of the litigants, it is a decision arising from a number of equally permissible options.⁴

[19] A Court of Appeal will not lightly interfere with the exercise of the lower Court's discretion. The grounds for interfering with the exercise of a discretion are usually only where the discretion was not exercised judicially; or where the decision was influenced by wrong principles; or where the decision was affected by a misdirection on the facts; or where the decision could not reasonably have been reached by a Court properly directing itself to the

³2012 (4) SA 618 (CC), para 71.

⁴*Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd and Another* 2015 (5) SA 245 (CC), para 89.

relevant facts and principles. The law in this regard is trite.⁵

[20] Based on the foregoing, the instances in which leave to appeal is granted against costs orders only are rare.⁶

[21] The threshold that the first respondent faces does not end here. Section 16(2)(a) of the Act requires that 'exceptional circumstances' must be established for the applicant to succeed in an application for leave to appeal on the issue of costs.

[22] No exceptional circumstances are alleged by the first respondent. I agree with Mr. van Rensburg, who appeared on behalf of the applicant, that there is nothing exceptional about this matter.

[23] For these reasons, in my view there is similarly no prospect of success on appeal in respect of the costs order.

⁵ *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 (2) SA 1 (CC), para 11; *Trencon*, supra, paras 83-89; *Public Protector v South African Reserve Bank* 2019 (6) SA 253 (CC), paras 144-145; *Zuma v Office of the Public Protector and Others* [2020] ZASCA 138 (30 October 2020), paras 20-22.

⁶ *Tebeila Institute of Leadership, Education, Governance and Training v Limpopo College of Nursing and Another* 2015 (4) BCLR 396 (CC), para 13.

[24] Lastly, these proceedings flow from the enforcement of the lease agreement between the applicant and the first respondent, which agreement provides for costs on an attorney and client scale.

[25] The first respondent is thus contractually liable for costs on the attorney and client scale, should he be ordered by the court to pay costs in respect of proceedings arising from such agreement, which includes the present application.

[26] In the circumstances it is ordered as follows:

- (i) The application for leave to appeal is dismissed with costs on the scale as between attorney and client.

HOLDERNESS AJ

APPEARANCES

For the Applicant:

Mr. van Rensburg
Van Rensburg & Co Attorneys

For the Respondent:

In person
Mr. Rogerio Viana