

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

(1)	REPORTABLE: YES/NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED: YES/NO
23/04 2024	[REDACTED]

CASE Number: 030448/2022

In the matters between:

HENNING WEIDLICH

PLAINTIFF

And

GEO-X (PTY) LTD BAL LOGISTIC
(PTY) LTD

FIRST RESPONDENT

BAL LOGISTIC (PTY) LTD

SECOND RESPONDENT

GOLDPLAT RECOVERY (PTY)LTD

THIRD RESPONDENT

KAYMAC (PTY) LTD

FOUTH RESPONDENT

ESKOM SOC (PTY) LTD

FIFTH TH RESPONDENT

JUDGMENT

BAQWA, J

Introduction

[1] The applicant seeks leave to appeal against a judgement in which this court granted an order placing the first respondent under business rescue and making a finding that the fifth respondent (Eskom Soc Ltd) was mis-joined in the proceedings and that prayer 3 of the notice of motion in that regard be dismissed with costs.

[2] The mis-joinder order is the only order that the applicant seeks leave to appeal against.

[3] Full reasons were provided in the judgment sought to be appealed against and I do not propose to furnish further reasons in this judgement.

[4] It is contended on behalf of the applicant that there are reasonable prospects that another court will come to a different conclusion regarding the order sought to be appealed against.

The law

[5] Section 17(1) of the Superior Courts Act No.10 of 2013 (The Act) provides:

“Leave to appeal may only be given when the judges concerned are of the opinion that;

- i) The appeal would have a reasonable prospect of success;
- ii) There is some compelling reason why the appeal should be heard, including conflicting judgements on the matter under consideration”

[6] This court found in paragraph 19.3 of the judgement that fifth respondent was mis-joined to the proceedings because certain documents including annexure EK1 also referred to as the NEC 3 contract make no reference whatsoever to Eskom SOC.

[7] It is trite that an applicant in motion proceedings must make out a proper case in their founding papers to justify the relief sought. In the *National Council of Societies for the Prevention of Cruelty to Animals v Openshaw*¹ the court restated the position thus;

“it is trite law that the application motion proceedings must make out a proper case in the founding papers. *Miller J in Shakot Investments(Pty) Ltd v Town Council of the Borough of Stanger*, put the matter thus; In proceedings by way of motion the party seeking relief ought in his found in his founding affidavit to disclose such facts as would, if true, justify the relief sought and which would, at the same time sufficiently inform the other party of the case he was required to meet. The

¹ 2008 (5) SA 339 (SCA) at 349 A-b.

applicant must set out the facts to justify the relief sought and also to inform the respondent of the case he is required to meet. The appellant is precluded from making a case on appeal that was not only not pleaded on the papers but was also disavowed by the appellant in reply.”

[8] It would have been expected of the applicant relying on an agreement to demonstrate that the entity being sued is the entity bound by the agreement. As shown in the judgement, the applicant failed to do this.

[9] His failure lies in the absence in his pleadings of a factual nexus between Eskom SOC and the underlying NEC contract and for the link between Eskom SOC and the alleged settlement agreement. Absent this critical link in the applicant’s founding affidavit, no case is made out by the applicant

[10] The applicant attempts to find support in the fifth respondent’s answering affidavit. This he cannot do because before a court can turn to a respondent’s affidavit to resolve an apparent dispute of fact, it must be satisfied that the applicant has made out a prima facie case.

[11] It cannot be disputed that on the basis of the documentary evidence before the court, annexure C and the NEC contract, it is evident that the parties to the agreements are GEO X and Eskom Rotek Industries SOC Ltd.

[12] The inevitable conclusion is the one reached in the judgment, namely, there is no link or lis between Eskom SOC as a party and the applicant or GEO X.

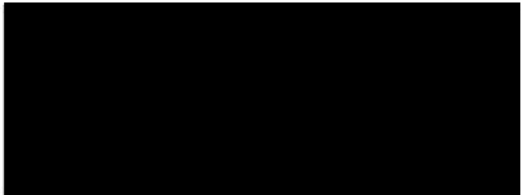
[13] It is also not in dispute that Eskom SOC and Eskom Rotek Industries SOC are, as a matter of fact two distinct entities with distinct registration numbers.

[14] The applicant has not been able to explain in his papers why he has sought relief against Eskom SOC well knowing that it is GEO X which entered into an agreement with Eskom Rotek Industries SOC Ltd.

[15] In the circumstances there are no reasonable prospects of success in any other count for an application that fails to make out a proper case in its founding papers. The applicant's case was deficient a quo and cannot be remedied. This much ought to have been clear to the applicant who despite the facts which have been staring him in the face has continued to pursue an application which was doomed to fail.

Order

[16] In the result the application for leave to appeal is dismissed with costs on an attorney and client scale.


SELBY BAQWA

JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Date of judgment: April 2024

Appearance

On behalf of the Applicants

Instructed by

Adv R F De Villiers

Deneys Zeederburg Attorneys

rfdevillier@gmail.com

On behalf of the Respondents

Instructed by

Adv M Desai

LNP Attorneys

Olwethu.mdleleni@lnpinc.co.za

