



IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case no.: 3979/2016

In the matter between:

GOLDEX 16 (PTY) LTD

Applicant

and

BODY CORPORATE OF WATERFORD GOLF
AND RIVER ESTATE SS139/2006

Respondent

CORAM: VAN ZYL, J

HEARD ON: 9 OCTOBER 2023

DELIVERED ON: 9 APRIL 2024

[1] This is an application for leave to appeal.

Succinct background:

- [2] An application between the parties which became known as “*the main application*” served before Daffue, J. The present applicant was also the applicant in the main application and the present respondent opposed the application and also filed a counter-application in the main application. Daffue, J dismissed the main application with costs and he also dismissed prayer 1 of the counter-application. He, however, issued the following order in the counter-application (quoted in its later amended form):

“4.1 The applicant is liable to pay the first respondent levies in respect of all vacant premises held by the applicant, (i.e. the areas of the common property demarcated for future construction of houses), on the same basis as other subsequent owners/developers of vacant stands over which they held and hold real rights of extension, such levies to be calculated and payable on a pro rata basis with owners of other sections.

4.2 The quantum of first respondent's monetary claim against applicant is referred to trial, the counter-application to stand as a simple summons and further pleadings to be exchanged in terms of the Uniform Rules of Court.’

2) Each party shall be liable for its own costs.”

- [3] The applicant subsequently filed an application which became known as “*the second stay application*” in which the relief sought in terms of the Amended Notice of Motion, was the following:

- “1. Declaring that paragraph 4.1 of the orders granted by the above Honourable Court on the 13th day of October 2017 and varied on the 9th day of November 2018 (“*the order*”) was obtained as a result of the respondent’s fraudulent conduct;
2. Setting aside the order in its entirety;
3. Directing the respondent to pay the costs of this application;
4. Further and/or alternative relief.”

[4] The second stay application served before me and I, *inter alia*, issued the following order:

- “4. The second stay application in terms of the Amended Notice of Motion is dismissed.
5. The applicant and Mr RRH (Rob) Hulme (in his personal capacity) are ordered to pay the costs of the second stay application, jointly and severally, payment by the one the other to be absolved, on a scale as between attorney and client, which costs are to include the costs referred to in paragraph 3 of the order granted by agreement between the parties pertaining to the interlocutory applications and the granting of condonation, as set out earlier in the judgment.”

[5] The applicant is seeking leave to appeal against the last mentioned paragraphs 4 and 5 of the order issued in the second stay application.

[6] I will henceforth refer to the parties as “Goldex” and “the Body Corporate”, respectively, like I did in the judgment in the second stay application.

Applicable legal principles pertaining to applications for leave to appeal:

[7] Section 17(1)(a) of the Superior Courts Act, 10 of 2013 (“the Act”) determines 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) ...” [My emphasis]

[8] In the judgment of **Acting National Director of Public Prosecutions v Democratic Alliance In Re Democratic Alliance v Acting National Director of Public Prosecutions** (19577/09) [2016] ZAGPPHZ 489 (24 June 2016) the court held at para [25] of the judgment that the Act has raised the bar for granting leave to appeal and in this regard it referred to the judgment of **The Mont Chevaux Trust (IT 2012/28) v Tina Goosen and 18 Others** 2014 JDR 2325 (LCC), in which judgment the court held as follows at para [6]:

“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 Cronwright & 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.”

See also **Rohde v S** 2020 (1) SACR 329 (SCA) at para [8] and **Fair-Trade Independent Tobacco Association v President of the Republic of South Africa and Another** (21688/2020) [2020] ZAGPPHC 311 (24 July 2020) at para [4].

- [9] However, as correctly submitted by Mr Pincus, on behalf of Goldex, it has also been point out that the test on appeal should not be applied so strictly that the important and necessary procedural safeguards against judicial error is rendered nugatory. See **Muhanelwa v Gcingca** (4713/2017) [2018] ZAGPJHC 718 (27 February 2018) at para [15].

- [10] With regard to the test as to what constitutes "*reasonable prospects of success*" the well-known *dictum* in **S v Smith** 2012 (1) SACR 567 (SCA) at para [7] is applicable:

"What the test of reasonable prospects of success postulates is a dispassionate decision, based on the facts and the law that a court of appeal could reasonably arrive at a conclusion different to that of the trial court. In order to succeed, therefore, the appellant must convince this court on proper grounds that he has prospects of success on appeal and that those prospects are not remote but have a realistic chance of succeeding. More is required to be established than that there is a mere possibility of success, that the case is arguable on appeal or that the case cannot be categorised as hopeless. There must, in other words, be a sound, rational basis for the conclusion that there are prospects of success on appeal."

- [11] In considering whether there is some other compelling reason why the proposed appeal should be heard, an important question of law may constitute such a compelling reason. However, the merits

thereof still need to be considered in deciding whether to grant leave to appeal or not. In **Caratco (Pty) Ltd v Independent Advisory (Pty) Ltd** 2020 (5) SA 35 (SCA) at para [2] the court determined as follows in this regard:

[2] In order to be granted leave to appeal in terms of s 17(1)(a)(i) and s 17(1)(a)(ii) of the Superior Courts Act an applicant for leave must satisfy the court that the appeal would have a reasonable prospect of success or that there is some other compelling reason why the appeal should be heard. If the court is unpersuaded of the prospects of success, it must still enquire into whether there is a compelling reason to entertain the appeal. A compelling reason includes an important question of law or a discrete issue of public importance that will have an effect on future disputes. But here too, the merits remain vitally important and are often decisive. Caratco must satisfy this court that it has met this threshold.” (My emphasis)

[12] In **Talhado Fishing Enterprises (Pty) Ltd v Firststrand Bank Ltd t/a First National Bank** (1104/2022) [2023] ZAECQBHC 16 (14 March 2023) the aforesaid principles were duly followed and applied:

- “4. Irrespective of the prospects of success, there may nevertheless exist a compelling reason for the appeal to be heard. The subsection does not contain an exhaustive list of criteria, and each application for leave to appeal must be decided on its own facts.
5. It is the applicant for leave to appeal must demonstrate that there is a compelling reason why the appeal should be heard.
6. ...

7. Other compelling reasons include the fact that the decision sought to be appealed against involves an important question of law and that the administration of justice, either generally or in the particular case concerned, requires the appeal to be heard. ...
8. As far as compelling reasons are concerned, the merits of the prospects of success remain vitally important and are often decisive.”

The grounds of the application for leave to appeal:

[13] The grounds of appeal are set out in 47 paragraphs which extend over 16 pages. For this reason and because it in any event forms part of the record, I do not intend repeating same herein.

[14] I do, however, for the sake of clarity and completeness, wish to record that Mr Pincus indicated during the hearing of the arguments that Golde is not seeking to appeal the costs order on its own and on a separate basis. The proposed appeal against the costs order runs hand in hand with the proposed appeal on the merits of the application.

The merits of the application:

[15] My judgment in the second stay application consists of 115 pages. In my view it is a very detailed and comprehensive judgment. I dealt at length with all the relevant evidence, as well as the applicable legal principles. To my knowledge I also dealt with every substantial and relevant argument presented by the respective parties during the hearing of the second stay application. I also set

out my line of reasoning in respect of every conclusion and finding I made.

[16] If I am to deal afresh with the grounds of the application for leave to appeal and the detail of the arguments and submissions by Mr Pincus advanced in support thereof, it will result in the repetition of a judgment similar in volume and nature than my judgment of the merits of the second stay application.

[17] In my judgment on the merits I dealt with the arguments which were now repeated in the application for leave to appeal. I have again duly considered the respective grounds and arguments and in my view there is no reasonable prospect that another court would come to different conclusions with a resultant different outcome to the application.

[18] Mr Pincus furthermore submitted that there are compelling reasons why this proposed appeal should be heard. He submitted in his heads of argument as follows:

“In this regard, it is in the interests of justice that orders occasioned by fraudulent conduct ought not be allowed to stand, more particularly when the administration of justice is involved.”

[19] I do not deem it necessary to make a finding whether the present matter falls within the ambit of “*the administration of justice*” as meant by the interpretation of section 17(1)(a)(ii) of the Act. The fact remains, as evident from the authorities quoted earlier, the prospective merits of such a proposed appeal “*remain vitally*

important and are often decisive". I persist with my view that there is no reasonable prospect that another court would come to different a different conclusion.

- [20] In **Cassimjee v Minister of Finance** 2014 (3) SA 198 (SCA) at para [9] the Supreme Court of Appeal held as follows:

"[9] Section 34 of the Constitution provides that everyone has the right to have a dispute that can be resolved by the application of law decided by a court or tribunal in a fair public hearing, but a limitation of the protected right is permissible, provided that such limitation is reasonable and justifiable. The right of a high court to impose procedural barriers to litigation on persons who are found to be vexatious was recognised in *Beinash* (supra para 17). In that matter it was held that restricting access to vexatious litigants was indispensable to protect and secure the rights of those with meritorious disputes and necessary to protect bona fide litigants, the processes of the courts and the administration of justice. Compare also *Giddey NO v JC Barnard and Partners* 2007 (5) SA 525 (CC) (2007 (2) BCLR 125; [2006] ZACC 13) paras 15 – 18. The same considerations, I believe, would apply to an abuse of court procedures."

- [21] There is, in my view, consequently no basis upon which Goldex can be granted leave to appeal against paragraphs 4 and 5 of the order issued in the second stay application.

The costs of the application for leave to appeal:

- [22] Mr Strathern, on behalf of the Body Corporate, submitted that should the application for leave to appeal be unsuccessful, it will be fair and reasonable that Mr Hulme again be ordered to pay the costs of the application for leave to appeal in his personal capacity, jointly and severally with Goldex, payment by the one the other to

be absolved. He submitted that Mr Hulme should have accepted and taken responsibility for the situation subsequent to the judgment on the merits of the second stay application had been delivered instead of attempting to postpone the inevitable. The trial between the parties should be proceeded with as soon as possible in order to bring an end to the protracted and acrimonious litigation between the parties.

[23] Mr Pincus submitted that Mr Hulme was and is entitled to approach court to exercise his remedies if he believes that he has been denied justice and should not be penalised to have done so by means of the application for leave to appeal.

[24] I agree with the submissions of Mr Strathern. I have already dealt with the conduct of Mr Hulme in the judgment on the merits of the second stay application, paragraphs [187] to [204] thereof, which led me to have made an order of costs *de bonis propriis* on an attorney and client scale against him. In my view those reasons are *mutatis mutandis* applicable to the application for leave to appeal in that Mr Hulme persisted with the litigation even after the judgment on the merits of the second stay application became available. His conduct is unreasonable, vexatious and in bad faith.

Order:

[25] I consequently make the following order:

1. The application for leave to appeal is dismissed.

2. The applicant and Mr RRH (Rob) Hulme (in his personal capacity) are ordered to pay the costs of the application for leave to appeal, jointly and severally, payment by the one the other to be absolved, on a scale as between attorney and client.


C/VAN ZYL, J

On behalf of the applicant:

Adv S.P. Pincus SC
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On behalf of the respondent:

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