

IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, GQEBERHA)

Reportable/Not Reportable

Case No: 2810/2020

In the matter between:

AVBOB FUNERAL SERVICES

Applicant

and

BONIWE EUNICE BUZANI

Respondent

JUDGMENT ON APPLICATION FOR LEAVE TO APPEAL

Zono AJ

Introduction

1. On 27th February 2024, the applicant lodged an application for leave to appeal against the judgment delivered on 30th January 2024. The application is, on relevant part, couched in the following terms:

Take notice further that the applicant will apply for leave to appeal on the following grounds:

1. His Lordship erred in finding that no reasonable explanation was given by the applicant for its default.
2. His Lordship erred in finding that the applicant was reckless and/or intentional in its disregard of the rules of court.

3. His Lordship erred in finding that a bona fide defence to the main action is not a consideration in applications for upliftment of the bar.

4. His Lordship erred in failing to consider the applicant exception for purposes of establishing good cause.

5. His Lordship erred in failing to consider the applicant's prejudice.

6. His Lordship erred in finding that the application is mala fide and with the intention to delay the respondent's claim.

7. His Lordship erred in that, by dismissing the application, the court denied the applicant's right of access to the court.'

2. The enabling provision for an application for leave to appeal is Section 17(1) of Superior Court Act 10 of 2013 which 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.'

3. The procedure for application for leave to appeal is set out in Rule 49(1) in the following terms:

'(1) (a) When leave to appeal is required, it may on a statement of the grounds therefor be requested at the time of the judgment or order.

(b) When leave to appeal is required and it has not been requested at the time of the judgment or order, application for such leave shall be made and the grounds therefor shall be furnished within fifteen days after the date of the order appealed against: Provided that when the reasons or the full reasons for the court's order are given on a later date than the date of the order, such application may be made within fifteen days after such later date: Provided further that the court may, upon good cause shown, extend the aforementioned periods of fifteen days.'

4. Grounds upon which leave to appeal is sought are pivotal. The grounds of appeal must be clearly and succinctly set out in clear and unambiguous terms to enable the court and the respondent to be fully informed of the case the applicant seeks to make out and which the respondent is to meet in opposing the application for leave to appeal.¹ The sub rule is peremptory in this regard². In Xayimpi an application for leave to appeal was dismissed due to non-compliance with this subrule. The applicant simply attached an affidavit instead of setting out the grounds of appeal clearly and succinctly. It does not help the applicant to marshal grounds of appeal over the bar which have not been set out clearly and succinctly in the notice for leave to appeal, no matter how meritorious these might be.³

5. The present application for leave to appeal is replete with mere regurgitation of findings of fact and law contained in the judgment and does not embody the requisite grounds for leave to appeal. No explanation or condonation application is made for that failure.

6. A statutory requirement construed as peremptory needs exact compliance for it to have the stipulated legal consequence, and any purported compliance falling short of

¹ Songono v Minister of Law and Order 1996 (4) SA 384 (E) at 385 I-J; Hing v RAF 2014 (3) 350 (WCC) at 353 J, S v McLaggan 2013 (1) SACR 267 (ECG) Paras 4-7

² Xayimpi and Others v Chairman Judge White Commission (Formally known as Browde Commission) 2006 (2) ALL SA 442 (E)

³ Municipality of Thabazimbi v Badenhorst (66933/2011) [2024] ZAGPPHC 212 (26 February 2024) Paras 12-15

that is a nullity.⁴ As a general Rule non-compliance with a peremptory provision results in a nullity.⁵ It flows herefrom that the filing of an application for leave to appeal without the necessary grounds of appeal is a nullity and must be taken not to have existed or taken place.

7. It is from the grounds of appeal that the court may be able to discern that there are prospects of success on appeal. Without proper grounds having been properly articulated or set out in an application for leave to appeal, no application may succeed. Failure to set out grounds of appeal in application for leave to appeal render the application for leave to appeal to be fatally defective.

8. An applicant for leave to appeal must convince the court on proper grounds that there is a reasonable prospects 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.⁶

9. It remains uncontroverted that the applicant has failed to give full and reasonable explanation that covers the entire period of delay. There was no explanation to negate a conclusion that there was a reckless or intentional disregard of the Rules of court.

10. There is no basis laid out for proposition that applicant's exception should have been considered, especially in the light of the fact that it is accepted that it was a "*pro non scripto*".

11. It worths mentioning in that in paragraph 2 of the main judgment reference is made to non-compliance with Rule 27 (1) of the Uniform Rules of Court in that no agreement was first sought from the respondent for the upliftment of the bar. That is not

⁴ Shalala v Klerksdorp Town Council and Another 1969 (1) SA 582 (T) at 587 A-C

⁵ LAWSA vol 25, Page 399, Para 366; G.M Cockram: Interpretation of Statute Page 163

⁶ MEC for Health, Eastern Cape v Mkhitha and Another (122/2015) [2016] ZASCA 176 (25 November 2016) Para 17; S v Smith 2012 (1) SACR 567 (SCA) at para 7

contested in the application for leave to appeal. Therefor the application for the upliftment of the bar was prematurely brought.

12. The application for leave to appeal was admittedly filed out of time, and in contravention of the Rules of this court. To circumvent the consequences of that failure, the applicant makes an application for condonation of late filing of an application for leave to appeal. The wide powers of the court to condone non-compliance with its own Rules is subject to the requirement, and safeguard, that good cause must be shown.⁷ While the requirement of a good cause has not been shown by the applicant, I still exercise a discretion to condone the non-compliance aforesaid. The applicant seeks an indulgence not a right, therefore he must be ordered to pay costs of the indulgence. Therefore, costs cannot follow the result.⁸

13. It suffices to mention that the respondent raised two points in limine in her opposition of the matter; they relate to failure to file power of attorney and failure to file a resolution by the applicant. Both these points were abandoned during argument.

14. I accordingly make the following order.

14.1. The late filing of applicant's application for leave to appeal is hereby condoned.

14.2. The application for leave to appeal is hereby dismissed.

14.3 The applicant is hereby ordered to pay costs of the application for condonation and application for leave to appeal.

AS Zono
Acting Judge of the High Court

⁷ Chasen v Ritter 1992 (4) SA 323 (SE) at 329 C

⁸ AC Cilliers: Law of Costs, Page 2-24 to 2-25 Para 2.30 and 2.31

APPEARANCES

Counsel for the Applicant: Adv Lambrechts, instructed by Smith Tabata Inc and Rupert Candy Attorneys Inc.

Counsel for the Respondent: Adv Menti, instructed by NE Mbewana Attorneys Inc.

Date heard: 17 April 2024

Date delivered: 17 April 2024