

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NO: B39834//22

DOH: 25 August 2023

1.	REPORTABLE: NO /YES
	OF INTEREST TO OTHER JUDGES: NO /YES
	REVISED.
SIGNATURE	<u>04 September 2023</u>
	DATE

In the matter of:

DR RISHI HARSHAD PEMA

First APPLICANT

DR PHARBOO AND ASSOCIATES INC

Second APPLICANT

and

HEALTH-WORX MEDICAL CENTRES (PTY)

RESPONDENT

JUDGEMENT - LEAVE TO APPEAL

**THIS JUDGEMENT HAS BEEN HANDED DOWN REMOTELY. IT SHALL BE
CIRCULATED TO THE PARTIES BY WAY OF E- MAIL / UPLOADING ON
CASELINES. ITS DATE OF HAND DOWN SHALL BE DEEMED TO BE
4 SEPTEMBER 2023**

Bam J

A. Introduction

1. The decision / judgement in respect of which the respondent seeks to leave was granted on 16 November 2022. I had undertaken to provide reasons soon after the urgent week but it was not to be. Regrettably, the reasons were finally provided on 6 June 2023 as I was away for some time due to unavoidable personal challenges. The present application for leave to appeal followed immediately after I had provided reasons and it is opposed by the applicants. For ease of reference, I refer to the parties as they were in the original application.
2. The respondent applies for leave to appeal on the basis of Sections 16 and 17 (1) (a) (i) and (ii) of the Superior Courts Act¹. It seeks leave to appeal to either the Supreme Court of Appeal or to the Full Court of this Division. Its grounds are set out in its notice of application for leave to appeal. The respondent concludes that there are reasonable prospects that another court would come to a different decision and there are also compelling reasons as to why leave to appeal must be granted. Before I consider the

¹ 10 of 2013

respondent's grounds, it is useful to first consider the legal framework governing appeals.

B. The law

3. The law regulating the question whether to grant an application for leave to appeal is set out in Section 17 (1) (a). The provision reads:

Leave to appeal may only be given where the judge or judges concerned are of the opinion that—

- (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;'

4. To understand the weight placed on the applicant for leave to appeal, one must refer the decisions of Superior Courts. Not so long ago, the full court of this division in *Fair-Trade Independent Tobacco Association v President of the Republic of South Africa and Another* (21688/2020) [2020] ZAGPPHC 311 (24 July 2020), paragraph 5 reiterated the principle:

'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.'

5. The SCA has recently confirmed that the mere claim of existence of some prospect of success is not sufficient. A sound rational basis must be shown that there are indeed reasonable prospects of success. In *Ramakatsa and Others v African National Congress and Another*, it was said:

‘...[L]eave to appeal may only be granted where the judges concerned are of the opinion that the appeal would have a reasonable prospect of success or there are compelling reasons which exist why the appeal should be heard such as the interests of justice...I am mindful of the decisions at high court level debating whether the use of the word ‘would’ as opposed to ‘could’ possibly means that the threshold for granting the appeal has been raised. If a reasonable prospect of success is established, leave to appeal should be granted...Those prospects of success must not be remote, but there must exist a reasonable chance of succeeding. A sound rational basis for the conclusion that there are prospects of success must be shown to exist.’²

C. Respondent’s grounds

6. I now deal with the respondent’s grounds:

Ground 1: The court erred in failing to consider that the basis for termination of the applicant’s services was that he had perpetrated fraud against the second applicant and the respondent.

Ground 2: The court should have found that the fraud committed by the applicant permitted the respondent to terminate his services and the use of the premises.

² (Case No. (724/2019) [2021] ZASCA 31 (31 March 2021), paragraph 10

7. The applicants brought a case of spoliation to this court and it is that case that this court dealt with. It is idle of the respondent to seek leave to appeal on the basis that the court ought to have found that Dr Pema had defrauded the second applicant — of which he is the sole member — and the respondent, based on the respondent's allegation. As my judgement found, the respondent had no justification for spoliating the applicants. My judgement further deals with the absurdity of the claims made by the respondent and its manager, Mr van Zyl, that in spoliating the two applicants, they were in fact acting on behalf of the second applicant. There is no merit to this ground and no prospect that another court would reach a different conclusion.

Ground 3: The court incorrectly applied the principle espoused in *ATM (Pty) Ltd v Olkru Handelaars CC* with regard to the inappropriateness of spoliation as a remedy in disputes dealing with contractual rights or specific performance of contractual obligations.

Ground 4: The court erred in considering the contractual dispute. The court should have followed the principle in *Olkru*.

8. The judgement distinguishes the facts in *Olkru* and the applicability of the remedy of spoliation as found by the court in that case, as opposed to the present case. It does not assist the respondent to merely claim conflation of the spoliation remedy with enforcement of contractual rights in my judgement, which is not the case. Simply, the applicants were spoliated and it is that case that this court dealt with. Like the first two

grounds, this ground has no merit and there are no prospect that another court would come to a different finding.

Ground 5: The court should have found that there was a dispute of fact with regard to HW1 and that the respondent was in fact the chairman of the second applicant.

9. The judgement deals adequately with the respondent's case surrounding HW 1 and my findings in this regard. The respondent has not disturbed my reasoning in any manner. There is no merit to this ground and no prospect that another court would come to a different finding.

Ground 6: The court erred in finding that the respondent should be liable for the applicant's costs on the scale of attorney and client.

10. My judgement reasons the issue of costs in relation to the respondent's conduct and appropriateness of mulcting it in costs on the scale as between attorney and client. There is no prospect that another could would interfere with this court's discretion in that regard in the circumstances of this case.

Ground 7: The court should have found that the applicants were not entitled to rely on *mandament van spoile*.

11. This is merely a repetition of grounds 3 and 4. The respondent has not disturbed my reasoning as set out in the judgement. There is no merit to this ground.

Ground 8: Compelling reasons:

(i) There are prospects of success.

(ii) The matter involves important issues of *mandament van spoile* and the effect of fraud on cancellation of a contract. Should the position remain that an applicant is entitled to rely on the remedy of *mandament van spoile* having committed fraud, the contracting freedom of parties such as the respondent will be violated.

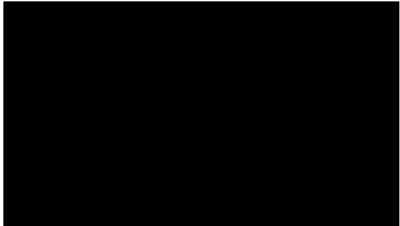
12. The simple dispute between the parties had to do with the respondent's conduct of taking the law into its own hands. That is what impelled the applicants to respond with a *mandament van spoile*. It has no effect on contractual remedies for a party claiming to have been defrauded. There is nothing compelling whatsoever that warrants granting leave to appeal in this case.

D. Conclusion and discussion on costs

13. For all the reasons set out in this judgment, the application lacks merit and warrants dismissal with costs.

E. Order

14. The application for leave to appeal is dismissed with costs.

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BAM NN

**JUDGE OF THE HIGH COURT,
PRETORIA**

Date of Hearing: 25 August 2023

Date of Judgement: 04 September 2023

Appearances:

Applicants' counsel: Adv F.C Lamphrect

Instructed by: R S Ramsay Naidoo & Associate
Midrand, Johannesburg

Respondent's Counsel: Adv A.A Basson

Instructed by: Wolmarans & Susan Inc.
c/o Raubenheimers Attorneys Inc.
Lynwood, Pretoria