



REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NO: 2220/2017

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED:

24 November 2022 *R. Mkhwebu*

In the matter between:

NT MAKHUBELE ENTERPRISE CC

First Applicant

NATHANIEL TSAKANE MAKHUBELE

Second Applicant

and

BUSINESS PARTNERS LIMITED

Respondent

JUDGMENT ON LEAVE TO APPEAL

GRENFELL AJ

[1] INTRODUCTION

1.1. The applicants, unsuccessfully applied to amend their particulars of claim. The judgment, refusing leave to amend on the ground that to grant same, would

render the applicants' particulars of claim excipiable, as failing to disclose a cause of action, was handed down on 19 June 2020. Leave to appeal is sought on three grounds, namely, a misdirection on the facts, a misapplication of the relevant legal principles and bias against the applicants in refusing leave to amend.

- 1.2. This application was heard by video-conference on 18 November 2022, the first available date, after I had been notified of an application for leave to appeal. The more than two year delay in getting to that point was not addressed by either party, and remains unexplained, but nothing more need be said about it.
- 1.3. Mr Makhubele filed a practice note, heads of argument and a list of authorities in support of the leave to appeal sought, and addresses his submissions at length during the hearing. He submitted that the Full Bench of this division should be the forum to hear the appeal.

[2] FACTS AND LEGAL PRINCIPLES

- 2.1. There is no dispute on the principles governing amendments to pleadings. They should always be allowed, subject to prejudice to other party. Courts should take a benevolent approach to pleadings, which need not be a picture of perfection and if there are differing interpretations, the amendment should be allowed. An amendment that would render a pleading vague and embarrassing within the amendment context, should not be refused but the refusal of the amendment should be reserved for rare cases where the effect thereof would be to render the pleadings defective by failing to make out a cause of action.

- 2.2. The applicants submissions, both in heads of argument and during the hearing, relied on a plethora of authorities, which were unhelpful as they set out trite principles that are not in dispute, but failed to deal with the crux of the judgment and the authority of *Nxumalo v First Link Insurance Brokers (Pty) Ltd* and the cases therein cited, which are authority for the proposition that if to allow an amendment would result in no cause of action being disclosed, the amendment should be refused, which is precisely what the judgment holds. This aspect was pertinently raised with Mr Makhubele during argument and the extract from the judgment was read to him and his submissions sought. There was no attempt to distinguish the *Nxumalo* decision or counter the effect of same. It remains unchallenged as the correct approach.
- 2.3. Instead, Mr Makhubele made the submission that because the upholding of an exception, invariably and on settled authority, resulted in a court always granting leave to amend, the judgment should have found that if the notice to amend was unsatisfactory, I should have granted the applicants further leave to amend, rather than dismissing the application. This erroneous and circuitous reasoning arises from a failure to appreciate that the applicants do not need the court's leave to bring a further amendment on notice in terms of the rules. The attempt to conflate the notice of intention to amend and the objection thereto, with an exception is the very situation that is avoided by refusing leave to amend if the result would be excipiablility.
- 2.4. This links to the point also raised with Mr Makhubele in argument, namely, that the refusal to grant the amendment sought on the grounds that to do so would render the pleadings defective in the truly excipiable sense of failing to disclose

a cause of action, is not a final judgment that closes the doors of court to the applicants. It was framed another way in the heads of argument of Mr Shepherd for the respondent, namely that the judgment is not dispositive of the applicants' rights.

- 2.5. Two other points were emphasised by Mr Makhubele from the 15 complaints numbered in letters in his practice note. First, that the applicants were not obliged to state whether their claims were in contract or delict, which is accepted, but it is a peripheral point, as the amendment failed to set out averments that would make out a case for either cause of action for the new parties and secondly, that the court didn't take into account the annexures to the pleadings, in particular the actuarial report. This complaint fails to address paragraph 5.3 of the judgment, which expressly deals with the averments that are lacking to sustain a cause of action for the two further entities, and deals specifically with the actuarial report annexed as NTM4.

[3] **BIAS**

- 3.1. The submission of bias was proceeded with in argument by Mr Makhubele, after much deliberation on his part. When interrogated however, it appears that the foundation of bias is based on the judgment's confining itself to what is relevant to decide the matter, nothing more.
- 3.2. The applicants were given every opportunity to state their case and make their submissions, both in the court a quo and in this application for leave to appeal. They delivered heads of argument and made full submissions. The applicants are disappointed with the outcome of the application to amend, but never

availed themselves of the opportunity to reflect on what was found to be lacking in the proposed amendment as specified in the judgment, which they could have done and brought a further application to amend, which they could have done at any time since 2020 and can still do. However, it is not for the court to give the applicants legal advice on how best to proceed when the applicants are dominus litis and must conduct their litigation as they see fit, having taken the legal advice of their choosing.

[4] THE APPLICATION FOR LEAVE TO APPEAL

- 4.1. I have summarised the three grounds on which leave to appeal is sought above.
- 4.2. The applicants referred in their heads of argument to *Makate v Vodacom Ltd* at [88], in submitting that the Bill of Rights must inform the interpretation of the rules, termed in the applicants heads of argument as the “Rule 28(4) jurisprudence”. I shall consider this as a standalone ground in considering whether the test for leave to appeal has been met.
- 4.3. The test for leave to appeal is no longer whether another court might hold differently, as submitted by Mr Makhubele, but rather whether there are prospects of success on appeal or whether there is some other compelling reason why the appeal should be heard. This formulation by me during argument, was agreed to by Mr Makhubele as the standard to be met.

[5] **THE TEST FOR LEAVE TO APPEAL**

5.1. It is a precondition to the granting of leave to appeal, that the court is of the opinion, that either, the appeal would have a reasonable prospect of success or that there is some other compelling reason why the appeal should be heard.

5.2. The wording of section 17(1) of the Superior Courts Act 10 of 2013 provides:

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

(a)(i) The appeal would have reasonable prospects 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 appeal sought to be appealed does not dispose of all the issues of the case the appeal would lead to a just and prompt resolution of the real issues between the parties.”

5.3. The wording of the rule was amended by virtue of the inclusion of the word “*would*” in section 17(1)(a)(i) thereof. As a precursor to the granting of leave to appeal, same should be seen as a more stringent requirement of reasonable prospects of success on appeal, as opposed to another court coming to a

different conclusion. I now consider whether the applicants have reasonable prospects of success on appeal.

[6] GROUNDS OF APPEAL

6.1. I am of the view that the refusal of leave to amend was not dispositive of the applicants rights, nor did it comprise a final judgment. The matter is pleaded and ready for trial and should additions be required to be made to the applicants pleadings, they can bring a notice to amend that sets out a cause of action. This was an avenue always open to them, and which remains open.

6.2. The constitutional point deals with the interpretation of Rule 28(4) dealing with amendments and there is no challenge of the validity thereof by Mr Makhubele.

6.3. I cannot form the opinion, in the absence of a dispositive order and proper cause of action sought to be introduced by amendment that the applicants have prospects of success on appeal or that there are special considerations requiring leave to appeal.

6.4. There is no reason why costs should not follow the result.

[7] CONCLUSION

7.1. Having failed to satisfy the test for leave to appeal the application falls to be dismissed.

[8] **ORDER**

I grant the following order:

- 1 The application for leave to appeal the order of 19 June 2020 is dismissed;
- 2 The costs of the application for leave to appeal, are to be paid by the applicants, jointly and severally, the one paying the other to be absolved.



Grenfell AJ

Appearances

For the applicants: Mr N T Makhubele

For the respondent: Adv M T Shepherd

Instructed by: Strydom Britz Mohulatsi Inc

Date of hearing : 18 November 2022 by video-conference and Date of judgment:
25 November 2022 - deemed date by email and uploading onto CaseLines