

IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION – EAST LONDON

CASE NO: EL 737/08

ECD 3037/08

Delivered: 24 July 2013

In the matter between:

UFUDO ESTATE AGENTS CC

t/a REMAX SUNSHINE COAST

Plaintiff/Respondent

and

RAKEL (PTY) LTD

Defendant/Applicant

LEAVE TO APPEAL

MAGEZA AJ

[1] On the relatively few occasions during which I have had to hear argument in respect of applications for leave to appeal, I must say I have not been particularly occasioned much ambivalence in granting such leave and have done so immediately pursuant to argument having been heard. This matter stands on quite a different footing in that, not only is the law clear on the issues under discussion but more importantly, the pertinent factual history convincingly lends itself to the cautions pointed out in our case law and authorities concerning both the requirement for the sufficiency of the 'reason(s) explaining the withdrawal sought' and the imperative to avoid an injustice and 'prejudice occasioned the other party' consequent upon such withdrawal.

[2] Having heard Mr Schultz for applicant and Mr Brooks for the respondent on this application for leave to appeal, I remain unconvinced that applicant sufficiently explained itself in its papers and am persuaded by respondent that it will suffer prejudice not capable of mitigation through either an award of costs or similar relief. I say so taking full cognizance of the argument made by Mr Schultz on behalf of applicant that this decision has the consequence of possibly closing the door on applicant (as defendant) in the relevant material respects, something that I appreciate, on tortured consideration, must yield to the rights that respondent (as plaintiff) must be allowed.

[3] Having heard the application on 19 October 2011 and handed down judgment on 8 November 2011, the application for leave itself was before me on 18 June 2013. In my principal judgment after having considered the matter, I came to the conclusion reached having also accepted, *inter alia*, that:

"Plaintiff points out that if Defendant were to be allowed to amend its plea, this would necessitate the joinder of a third party to the proceedings and this would needless to say cause it severe financial prejudice and obstruct the Plaintiff's right to have its case timeously disposed of. It furthermore asserts that the Defendant's application is a

delaying tactic and an attempt to prevent it from obtaining justice. Plaintiff also points that any claim against Lutge has now prescribed.”

[4] In order to succeed in the application for leave to appeal, applicant must show that there is a reasonable prospect of success on appeal. –see Pharmaceutical Society of South Africa v Tshabalala - Msimang 2005 (3) SA 238 (SCA) at para 40. I am also alive to the precaution that where a Court decides to refuse leave to appeal, it is not necessary for it to give reasons why it does so as the reasons for its findings will have already been set out in its judgment. Indeed the authorities say such a course ought to be discouraged. – see Mphahlele v First National Bank of SA Ltd 1999 (2) SA 667 (KH) (199 (3) BCLR 253) and (Beyers v Elf Regters van die Grondwetlike Hof 2002 (6) SA 630 at 635 paras [4] and [5].

[5] Suffice to repeat only this that the basis on which the applicant brought the application for the withdrawal of the admissions made in its plea and the reasons for the refusal of that application by this Court are in my view sufficiently set out in the judgment. The law pertinent thereto is stated, discussed and applied.

[6] Applicant also seeks leave to appeal the order of costs granted on an attorney and client scale. Mr Schultz argued that the order was made without the parties being invited to argue the issue of costs on this scale. In paragraphs (6) to (10) of my judgment I deal with what I characterize as the applicant’s failure to give a logical, coherent and candid explanation as to what the meetings were precisely concerned with and what decisions were arrived at thereanent. Applicant wholesomely failed to address itself to the specifics of the discussions around the matters it was required to sufficiently explain, that is, how the contentious issues in the meetings referred to were resolved. The applicant avoided pinning itself to even moderate detail and resorted instead when unable to do so by attempting to detach itself from those discussions. I remain needless

to say left with a negative impression in respect of the basis on which the application was brought; the passage of time between the making of the admission and the application; the timing thereof coming as it did after a pre-trial where the issue was not raised and the trial itself, as all suggestive of an effort to, *inter alia*, buy time. That is to say nothing of the applicant's knowledge of the setting in of prescription against Lutge as stated by Respondent. All these are tantamount to an abuse of the processes of this Court and the Court has a judicial discretion in such circumstances to express its rebuke and if necessary, to make such an order. – see Commissioner for SARS v Hawker Air Services (Pty) Ltd: 2005 (5) SA 283 (T); Lourenco v Ferela (Pty) Ltd (No1) 1998 (3) SA 281 (T); Rhino Hotel and Resort (Pty) Ltd v Forbes 2000 (1) SA 1180 (W).

[7] The application for leave to appeal is therefore refused.

MAGEZA AJ

18 JULY 2013