

IN THE HIGH COURT OF SOUTH AFRICA
(ORANGE FREE STATE PROVINCIAL DIVISION)

Application nr: LA73/2004

In the matter between:

MAIM GAMUR (PTY) LTD

Applicant

and

AFGRI OPERATIONS LTD

Respondent

JUDGMENT: RAMPAL J

HEARD ON: 3 SEPTEMBER 2004

DELIVERED ON: 30 SEPTEMBER 2004

- [1] These proceedings were concerned with an application for leave to appeal. The applicant who was also the applicant in the main application applies for leave to appeal against my judgment which was delivered on Thursday 29 April 2004. I made the original order on 12 December 2003 but gave the

reasons later.

[2] The application for leave to appeal is based on the following five grounds:

- “1. His Lordship should have found that the two lease agreements were severable and should have found that in as far as ERF 7342 is concerned, there was no dispute about the said lease agreement, and respondent was therefore not entitled to withhold any rent regarding the said lease. His Lordship should have found that respondent was compelled to pay the said rent and was not entitled to a set-off in view of the dispute of the rent already paid regarding ERF 5592.
2. His Lordship should have found regarding ERF 5592, that on the papers, respondent was in possession of the said erf, had paid rent in regard of the said erf, and was not entitled to cancel the said agreement.
3. His Lordship should have found that on a proper construction of the lease agreement regarding ERF 5592 the respondent was not entitled to cancel the said lease

agreement, ***alternatively*** His Lordship should have found, that a 7 day notice was too short a period for a proper cancellation of the said agreement.

4. His Lordship should have found that in terms of clause 5.8 of both rental agreements the respondent was not entitled to withhold any rent in case of any dispute.
5. His Lordship should have found that respondent has at least, on its own version, occupied the premises since the 4th of September 2003 in terms of the said agreement, and was still in occupation of the said premises at the hearing of the application and was therefore not entitled to cancel the said agreement (in regard to ERF 5592) and therefore not entitled to withhold any rent in respect of ERF 5592.”

[3] On the strength of the foregoing grounds mr. Van Rhyn, counsel for the applicant, assisted by mr. Reinders, submitted that there is a reasonable chance that another court might come to the finding that I erred in one or more or all of those grounds.

- [4] The application was opposed on behalf of the respondent whose counsel mr. Limberis, contended that the applicant did not have a reasonable prospect of success on appeal. He submitted that no other tribunal would differ from me on the conclusions I reached.
- [5] When I was presiding in the original proceedings I did so from the comfort zone of a man in the middle. I saw myself in that middle position as a neutral mediator. In the eyes of the law I was required and expected to be an objective assessor in the dispute. Like a referee in a soccer match, when I gave the reasons for my judgment I thought I had blown the final whistle to signal the end of the match. But it was not to be. The applicant soon filed a protest. I felt like an umpire dethroned from an elevated tower of comfort on the touchline and drawn right into the tennis court. Here there is no via media anymore. I am now in the same side of the tennis court as the successful party. The unsuccessful party now sees me as its adversary but the successful party

sees me as its ally. The leave to appeal is in effect a protest which calls upon a judge to acknowledge that he or she did not correctly reason out the judgment.

- [6] The invidious position of a judge called upon to consider whether to grant or not to grant leave to appeal was eloquently articulated by *Centlivres JA* in **REX v BALOI** 1949 (1) SA 523 AD on p. 524 – 525.

“We are aware that this Court is able to apply the proper test with greater ease than the trial Judge. For the trial Judge must, in the nature of things, find it somewhat difficult to look at the matter from a purely objective standpoint; he has a natural reluctance to say that his own judgment is so indubitably correct that the Judges of appeal will concur therein.”

In the case of **AFRIKAANSE PERS BEPERK v OLIVIER** 1949 (2) SA 890 (OPD) on p. 894 *Brink J* appreciated the same difficulty. He expressed himself as follows:

“Dit is geen benydenswaarde taak vir ‘n Regter om oor die juistheid

van ‘n uitspraak waarmee hy saamgestem het te oordeel nie – hy sal soos Appèlregter *Centlivres* in **BALOI** se saak opmerk, ‘n natuurlike huiwering hê om te sê dat sy uitspraak so ontwyfelbaar juis is dat die Appèlhof nie van hom sal verskil nie.”

[7] *Ogilvie Thompson AJA* echoed similar sentiments. About a decade later, he said:

“From the very nature of things it is always somewhat invidious for a Judge to have to determine whether a judgment which he has himself given may be considered by a higher Court to be wrong; but that is a duty imposed by the legislature upon Judges in both civil and criminal matters.”

(*vide* **REX v MULLER** 1957 (4) SA 642 AD on p. 645)

This passage was later quoted with approval by *Diemont JA* in **S v SIKOSANA** 1980 (4) SA 559 AD.

I am in complete agreement with the foregoing sentiments by the distinguished four judges. Today, more than 50 years

since the initial remarks were made by *Centlivres JA* we are still grappling with precisely the same problem. I may add that the difficulty is here to stay. Seemingly it will never go away. It is inherent in human nature.

- [8] Over many years the requisite for leave to appeal has been held to be a reasonable prospect of success. See for instance **REX v NXUMALO** 1939 AD 580 on p. 581; **REX v NGUBANE AND OTHERS** 1945 AD 185 on p. 187; **REX v BALOI** 1949 (1) SA 523 AD; **HAINE v PODLASHUC & NICOLSON** 1933 AD 104 and **S v SIKOSANA** 1980 (4) SA 559 AD.

The basic rule laid down by the Supreme Court of Appeal is that leave to appeal should not be granted unless the applicant satisfies the trial court concerned that he has a reasonable prospect of success on appeal. This then is the basic test.

- [9] It must be readily appreciated that the basic rule is

formulated in the negative mode and not the positive mode.

This was deliberately done. In the case of **THE ROAD**

ACCIDENT FUND v DALY; Case Nr: LTA50/04 (*ex*

1857/2001) Free State High Court at par. 9 thereof I said:

“It was done on purpose in order to convey the message: that decisions of our courts of law especially those of the high courts must generally be regarded as correct unless the contrary can be shown; that it is incumbent upon the applicant to discharge the onerous duty of satisfying the trial court that its decision is probably wrong; that the trial court should not readily succumb to the temptation of believing on flimsy grounds that its judgment is wrong and that it is neither in the interest of the victorious litigant nor the interest of the general public to have the wheels of justice slowed down by appeals which are devoid of substantive merits.”

- [10] Quite often when a judge is still a novice on the bench, as *in casu*, the temptation becomes irresistible to let a matter go on appeal so that one can see what the higher tribunal of three judges in the case of “The High Court” or the higher tribunal of five judges in the case of “The Supreme Court of Appeal” will decide. That however is not a proper test to be

applied. Such a temptation, however attractive and seductive, must be avoided. It is unfair to the victorious litigant. It is also undesirable and unwarranted to burden colleagues in the higher tribunal with appellate jurisdiction with such undeserving appeals. The test laid down in **REX v NGUBANE** *supra* remains the only proper criterion that should always be applied in determining whether or not to grant leave to appeal.

“In all the cases, no matter what form of words was used, the same thing was, in my opinion, intended to be conveyed, namely that it is for the applicant for special leave to satisfy the Court that, if that leave be granted, he has a reasonable prospect of success on appeal. That was the test applied, for instance, in **BEZUIDENHOUT v DIPPENAAR** (1943, A.D. at p. 195), and it is, in my view, the correct one.”

(per Davies AJA in **REX v NGUBANE** 1945 AD 185 on p. 187.)

The dominant issue of the enquiry is whether, if leave to appeal is granted, the applicant will have a reasonable

prospect of success on appeal. If the answer is in the affirmative leave to appeal must be granted. If the answer is in the negative leave to appeal must be refused.

- [11] In the case of **S v SHABALALA** 1966 (2) SA 297 AD at 299 *Rumpff JA* gave an instructive and informative exposition of the normative rule.

“Alleen dan wanneer die Verhoorregter tot ‘n weloorwoë konklusie kom dat daar gronde is waarop die Hof van Appèl tot ‘n ander afleiding van die feite kan kom as wat hy gekom het, en daar dus ‘n redelike moontlikheid van sukses vir die applikant bestaan, behoort verlof toegestaan te word. Bestaan daardie moontlikheid, behoort verlof ook toegestaan te word sonder huiwering of teësin.”

- [12] Our caselaw shows that in grappling with the uneasy task of enquiring whether or not leave to appeal should be granted certain considerations have weighed significantly with the Supreme Court of Appeal or the Appellate Division, as you wish. I might mention some which may underpin the refusal of leave to appeal. That leave to appeal is not to be had for

the mere asking. The central legislator of the national parliament has not granted a carte blanche licence to appeal as of right to every vanquished litigant; (*vide* **AFRIKAANSE PERS BEPERK v OLIVIER** 1949 (2) SA 890 on p. 894 per *Brink J.*)

“Die vergunning van verlof om in hoër beroep te gaan is egter geen blote formaliteit nie.”

- That the victorious litigant should not be frustrated by unnecessarily subjecting him or her to the disadvantages and inconvenience of the appeal procedure.

“Die Hof moet sig tevrede stel dat daar ‘n redelike vooruitsig is dat die appèl sal slaag. Dit is onbillik teenoor ‘n party in wie se guns ‘n uitspraak gegee is deur ‘n hoër hof om hom te onderwerp aan al die nadele van ‘n appèl, indien sy teenparty geen redelike kans op sukses het nie.”

(Per Brink JA in **AFRIKAANS PERS BEPERK v**

OLIVIER *supra* on p. 894.)

- That it should not be overlooked that, even if leave to appeal is refused, another grievance avenue is still open to the applicant to petition the SCA President for leave to appeal. (*vide* **R v MULLER** 1957 (4) SA 262 AD per *Ogilvie Thompson JA*.)

- That the amount of the claim in issue is relatively small in comparison with the tremendous costs already incurred in connection with such a claim. (*vide* **VOLLENHOVEN v HOENSON & MILLS** 1970 (2) SA 368 (CPD) at 372H – 373B per *van Wyk J*)

- That it is in the public interest and in the interest of the successful litigant to have litigation finalized as speedily as possible; *vide* **Vollenhoven v Hoenson & Mills** *supra* at 373 B – C.

- That the gravity of the adverse consequences of the

judgment to the applicant should not influence the trial judge to relax the basic rule of a reasonable prospect on sympathetic grounds.

- [13] It will now be readily appreciated that the grant of leave to appeal is, so to speak, an exception to the basic rule hence the description “special leave”. Where such leave to appeal is granted the reasons have to be given for the benefit of the higher tribunal whose duty it will be to hear the appeals (*vide* **S v SIKHOSANA** 1980 (4) SA 559 AD at 562 A per *Diemont JA*. Where there are several grounds of appeal as in the instant case, it is expected of the trial judge to indicate those specific grounds in respect of which leave to appeal has been granted. Where the trial Judge is of the opinion that there are merits in some grounds but none in others leave to appeal may be limited to the former grounds by discarding the latter in respect of which a reasonable prospect of success does not exist. *Vide* **R v JANTJIES** 1958 (2) SA 273 AD at 275 per *Schreiner JA* as well as **S v SIKHOSANA** *supra* 363B.

[14] The first ground of appeal relates to the first lease agreement in respect of industrial property situated at erf 7342. The critique here is that I failed to appreciate that the applicant's claim in this regard was distinct and separate from the applicant's claim which relates to the second lease agreement in respect of the industrial property situated at erf 5592. Mr van Rhyn submitted that since there was no dispute about the first lease agreement the respondent was therefore not entitled to withhold any rent regarding the first lease agreement.

[15] I was mindful of the distinction between the applicants' two claims against the respondent throughout. Although I did not expressly deal with the first lease agreement the following reasoning was implicit in my judgment as far as the first lease agreement was concerned:

- That there was no dispute between the parties in respect of the first lease agreement.
- That there was a dispute between the parties in respect of the second lease agreement.

- That I found in favour of the respondent that the plaintiff had failed to give the respondent beneficial occupation of the leased premises in terms of the second lease agreement.
- That I found in favour of the respondent that the respondent did not knowingly pay the sum of R99 750,00 as due rental to the applicant in terms of the second lease agreement.
- That the applicant on five different occasions submitted to the respondent's head office invoices and received on five different occasions money from the respondent *sine causa debiti*.
- That the respondent had a sound claim against the applicant to recover such a sum of money inadvertently paid to the applicant.
- That the respondent was not precluded by the terms and conditions of the first lease agreement from setting off the amount of the claim which the respondent had against the applicant under the second lease agreement as against the rental the applicant had against the respondent under the first lease agreement.
- That in the end I had to accept the version of the respondent as regards the applicant's claim based on the second lease agreement in accordance with the rule as fully set out in **PLASCON EVANS PAINTS (PTY) LTD v VAN RIEBEECK PAINTS (PTY) LTD** 1954 (3) SA 623 (AD) at 634 G.

[16] I have done my best to disabuse my mind in considering this

application for leave to appeal notwithstanding the argument of mr. Van Rhyn as assisted by mr. Reinders I am still not satisfied that the applicant has a reasonable prospect of success on appeal on the issue of a set off. I am persuaded by mr Limberis's submission that the respondent was entitled to apply a set off. My original view on this point therefore remains unchanged.

[17] As regards the remaining four grounds of the appeal I have nothing further to add. I abide by the reasons I advanced in my judgment. I am convinced that on the argument which was presented to me on 11 December 2003 I came to the correct conclusion.

[18] Accordingly I have come to the conclusion that I should refuse leave to appeal since the appellant has not satisfied me on a balance of probabilities that a reasonable prospect of success on appeal exists in the instant case. The applicant is at liberty to petition the Honourable President of the Supreme Court of Appeal.

[19] Accordingly I make the following order:

- [19.1] The application for leave to appeal is dismissed.
- [19.2] The applicant is directed to pay the respondent's costs relating to this application.

M.H. RAMPAL, J

On behalf of Applicant:

Advocate AJR Van Rhyn
Assisted by
Advocate SJ Reinders
Instructed by
Honey Attorneys
BLOEMFONTEIN

On behalf of Respondent:

Advocate Limberis
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