

REPUBLIC OF SOUTH AFRICA



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

DELETE WHICHEVER IS NOT APPLICABLE:

(1) REPORTABLE: ~~YES~~/NO

(2) OF INTEREST TO OTHER JUDGES ~~YES~~/NO

(3) REVISED:

DATE: 06 June 2024 SIGNATURE: [REDACTED]

CASE NO: 19982/2016

In the matter between:

ROAD ACCIDENT FUND

APPLICANT

and

LISBETH RUELE

FIRST RESPONDENT

MALEPE ATTORNEYS

SECOND RESPONDENT

SHERIFF PRETORIA EAST

THIRD RESPONDENT

THE LEGAL PRACTICE COUNCIL

FOURTH RESPONDENT

Delivered: This judgment was prepared and authored by the Acting Judge whose name is reflected and is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be 6 June 2024

JUDGMENT

MARUMOAGAE AJ

A. INTRODUCTION

[1] This is an opposed application for leave to appeal against part of the judgment and order granted on 19 January 2024. While the applicant is not opposed to the appeal being heard by the full court of this division should leave to appeal be granted, it prefers that the court grants leave to appeal to the Supreme Court of Appeal.

[2] On 19 January 2024, this court dismissed the applicant's application for rescission and the first respondent's point *in limine* and ordered the applicant to pay the costs of that application. The applicant seeks leave to appeal only against the dismissal of its rescission application and the costs order that was awarded.

B. SUBMISSIONS BY THE PARTIES

i) Grounds of Appeal

[3] In support of its application, the applicant raised several grounds for the appeal.

- [3.1] The applicant states that the court erred in dismissing its rescission application and granting a costs order against it.
- [3.2] According to the applicant, the court erred in finding that it could not rely on Uniform Rule 31(6)(a) for its rescission application and that the first respondent did not consent to the rescission in writing as envisaged by this Uniform Rule. Further, the court erred in finding that this Uniform Rule requires that written consent must be signed by both the judgment debtor and the judgment creditor, and that the Applicant relied on an incorrect Uniform Rule.
- [3.3] The applicant also contends that the court erred in not finding that the proposal by the first respondent's attorney that the matter should be retried was indicative of the first respondent's consent to the rescission of the default judgment. It is further contended that the court erred in finding that the first respondent did not instruct her attorney to propose that the matter should be retried, and that the first respondent was not bound by the agreement her attorney made with the applicant.
- [3.4] It was also stated that the court erred in not agreeing with the view and finding of Labuschagne AJ.
- [3.5] According to the applicant, the court further erred in finding that the email of 1 November 2021 was not in response to the proposal contained in the email of 7 October 2021.

[3.6] Finally, it was stated that the court erred in finding that the applicant relied on an incorrect rule.

ii) Applicant's Submissions

- [4] The applicant argued that should leave to appeal be granted, there are prospects of success in the appeal and a different court can come to a different conclusion. According to the Applicant, the first respondent's attorney acted on the first respondent's instructions to propose a retrial of the main action and the court erred in finding that the first respondent did not grant her consent for such proposal to be made.
- [5] The Applicant is of the view that a different court will interpret the first respondent's proposal that was contained in the email dated 1 November 2021 differently as Labuschagne AJ did in his judgment, where he granted the applicant an order suspending a court order dated 15 February 2021 and first respondent's writs of execution.
- [5] The applicant conceded that there are no conflicting judgments on the subject matter. However, it was argued that leave to appeal is sought based on the fact that a novel issue arose in this matter. According to the applicant, there is a need for a different court to reflect on the application of Rule 31(6)(a) and evaluate whether this rule requires written consent by the judgment debtor, or whether any consent would suffice. It is argued that this is the first compelling reason to grant leave to appeal.

- [6] According to the applicant, the second compelling reason that justifies the court granting leave to appeal in this matter is the question raised in paragraph 68 of the main judgment that requires an answer by a higher court. In that paragraph, it was stated that:

'[t]he fundamental question that arises is whether any judgment debtor at any time can bring a rescission application in terms of Rule 31(6)(a) of the Uniform Rules of Court even when such a judgment debtor has not fulfilled all its obligations to the judgment creditor and intends to raise a defence against the judgment creditor?'

- [7] The applicant further contends that the third compelling reason is that there is no definitive case law as to how Rule 31(6)(a) should be interpreted and applied. The applicant is of the view that the interpretation of this rule invokes greater public interest which necessitates a higher court or the Supreme Court of Appeal in particular, to provide guidance on how this rule should be interpreted and applied. It was argued that it is in the interest of justice to grant leave to appeal to the Supreme Court of Appeal.

iii) First Respondent's Submissions

- [8] The first respondent argued that the applicant failed to comply with the Uniform Rules of Court. It was further argued that the applicant failed to use the relevant rescission rule that ought to have been used to explain why its application for rescission was brought late. It was argued that no court would come to a different conclusion because the applicant used the incorrect rule to bring its rescission application. As such, the applicant will not succeed at a different court.

- [9] It was argued first that the applicant also failed to apply for condonation and generally failed to comply with the rules of the court. It was contended further that there was no consent between the applicant and the first respondent that the matter should be retried.

C. APPLICABLE LAW AND ANALYSIS

i) Reasonable Prospect of Success

- [10] In terms of section 17(1) of the Superior Courts Act,¹ there are two grounds upon which leave to appeal can be granted. First, the judge who granted an order must be of an opinion that the appeal would have a reasonable prospect of success.² It goes without saying that there is always a possibility of another judge reaching a different conclusion. However, that is not the test. The test is a subjective view of the judge who decided the matter of whether the appeal would have a reasonable prospect of success, and not 'may' or 'could' have a reasonable prospect of success.

- [11] There is some debate whether the use of the word 'would' in section 17(1)(a)(i) of the Superior Courts Act as opposed to the word 'could' entails that the threshold for granting leave to appeal has been raised. It was argued on behalf of the applicant that the bar has not been raised. In support of this argument, the applicant relied on the case of *Ramakatsa and Others v African National Congress and Another*,³ where it was stated that:

¹ 10 of 2013.

² Section 17(1)(a)(i) of the Superior Courts Act.

³ (724/2019) [2021] ZASCA 31 (31 March 2021) para 10.

'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'.

[12] Contrary to what was argued on behalf of the applicant, it does not appear as if the Supreme Court of Appeal answered the question of whether the usage of the word 'would' entails that the threshold for granting applications for leave to appeal has been raised. It is worth noting that the word 'would' is the past of the word 'will', which suggests something that will materialise when a particular condition is met. In other words, some circumstances should be met that will lead to the appeal succeeding.

[13] This is not a question of a mere probability or even a possibility. This is something that will take place should certain circumstances be met. The wording of the section leads to the interpretation that the usage of the word 'would' has indeed raised the threshold of granting applications for leave to appeal on the grounds of the prospect of success. This is not by accident because appeal courts are overwhelmed with heavy rolls and ought not to be burdened with appeals that do not have prospects of succeeding. This is certainly true for the Supreme Court of Appeal.

[14] The Supreme Court of Appeal in *MEC for Health, Eastern Cape v Mkhitha and Another*,⁴ provided a sense of the circumstances that must be met when it held that:

⁴ (1221/2015) [2016] ZASCA 176 (25 November 2016) para 16.

'[o]nce again it is necessary to say that leave to appeal, especially to this court, must not be granted unless there truly is a reasonable prospect of success'.

- [15] The usage of the word 'truly' entails that the court requested to grant leave to appeal must be satisfied that there are reasonable prospects of the appeal succeeding. This requires the applicant to illustrate to the court based on the facts of the case, the reasoning and application of the law to the facts by the court that issued the judgment, and the order that another court 'will' come to a different conclusion. In *MEC for Health, Eastern Cape v Mkhitha and Another*, the Supreme Court of Appeal authoritatively stated that:

'[a]n applicant for leave to appeal must convince the court on proper grounds that there is a reasonable prospect 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'.⁵

- [16] Out of the several grounds that the applicant listed as the grounds upon which leave to appeal is sought, it appears that only one ground directly relates to the prospect of success. The applicant raised an issue regarding the interpretation of the email written by the first respondent's attorney to the applicant's attorney and different approaches relating to this email in the main rescission judgment and the judgment of Labuschagne AJ.

- [17] The applicant is of the view that the court erred in holding that this email neither constituted an agreement nor consent for the main action to be retried. Irrespective of how this email should be construed, the court was confronted

⁵ *Ibid* para 17.

with the rescission application. This email does not come to the applicant's rescue.

- [18] The interpretation of this email does not answer the question of which Uniform Rule was the applicant entitled to bring its rescission application and when was the applicant supposed to bring this application. Most importantly, whether the applicant ought to have applied for condonation. With regards to the common law rescission as an alternative ground, it was illustrated in the main rescission judgment that the applicant failed to bring its application within a reasonable time. I am of the view that there is no reasonable prospect of success on appeal.

ii) Compelling Reasons

- [19] Secondly, in terms of section 17(1)(a)(ii) of the Superior Courts Act, a judge that granted an order may grant leave to appeal if he or she is of the opinion that:

'there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration'

- [20] The applicant can rely either on the reasonable prospect of success ground or this ground. The applicant relies on both grounds which entails that failure to establish the first ground is not the end of the road for the applicant. In *Caratco (Pty) Ltd v Independent Advisory (Pty) Ltd*, it was held that:

'[i]f the court is unpersuaded of the prospects of success, it must still enquire into whether there is a compelling reason to entertain the appeal. A compelling reason includes an important question of law or a discreet issue of public

*importance that will have an effect on future disputes. But here too, the merits remain vitally important and are often decisive’.*⁶

[21] During oral argument, counsel for the applicant seemed to place more emphasis on the fact that there are compelling reasons for leave to appeal to be granted. In its rescission application, the applicant relied on the Uniform Rule 31(6)(a). At least three reasons were listed as compelling to warrant leave to appeal being granted. The first reason was that the way this rule was interpreted in the main rescission application was novel. It appears to me that this application is merely intended to allow the appeal court to assess whether the way this rule was interpreted and applied in the main rescission application is correct.

[22] This cannot be the basis upon which the application for leave to appeal should be granted. If leave to appeal was to be granted on this basis, this may require an assessment of the correctness of the decision itself. This will open the floodgates for litigants to appeal matters merely for higher courts to assess their correctness. This court is not called to assess whether its decision was correct, but whether the appeal has reasonable prospects of success. In *S.L.M v B.M*, it was held that ‘... a Judge hearing an application for leave to appeal is not called upon to decide if his or her decision was right or wrong’.⁷

[23] Secondly, it was argued that leave to appeal must be granted to allow the appeal court to provide guidance on whether any judgment debtor at any time

⁶ 2020 (5) SA 35 (SCA) para 2. See also *Minister of Justice and Constitutional Development and Others v Southern African Litigation Centre and Others* (867/15) [2016] ZASCA 17; 2016 (4) BCLR 487 (SCA); [2016] 2 All SA 365 (SCA); 2016 (3) SA 317 (SCA) (15 March 2016) para 23.

⁷ (2017/30005) [2023] ZAGPJHC 890 (8 August 2023) para 5.

can bring a rescission application in terms of the Uniform Rule 31(6)(a) even when such a judgment debtor has not fulfilled all its obligations to the judgment creditor and intends to raise a defence against the judgment creditor. This is indeed an essential question of law but there are no conflicting judgments that warrants an appeal court's attention or clarity. There is currently no confusion as to how this rule should be applied.

[24] I do not agree that there is a need for clarity on the import of Uniform Rule 31(6)(a) and its application as compared to Uniform Rules 42(1) and Rule 31(2)(b) as well as the common law. Surely, Uniform Rule 31(6)(a) was inserted into the Uniform Rules to serve a particular purpose and that purpose cannot be the same as that served by Uniform Rules 42(1) and Rule 31(2)(b) as well as the common law.

[25] Thirdly, it was argued on behalf of the applicant that the way Uniform Rule 31(6)(a) was interpreted and applied in the main rescission application rule invokes greater public interest and warrants the attention of the Supreme Court of Appeal. The applicant has not made out a case for leave to appeal to be granted. It cannot be denied that Uniform Rule 31(6)(a) plays an important role and will affect judgment debtors and judgment creditors within the jurisdiction of this court. But this is not the test that should be met for applications for leave to appeal to be granted.

D. CONCLUSION

[26] There are no prospects of this appeal succeeding. I am also not convinced that compelling reasons have been advanced to grant leave to appeal in this matter.

ORDER

[27] In the result, I make the following order:

1. Leave to appeal is refused.
2. The applicant is ordered to pay the costs of this application.



C MARUMOAGAE

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION

PRETORIA

Date of Hearing: 08 March 2024

Date of Judgment: 06 June 2024

Appearances:

Counsel for the Applicant: Adv C.M Rip SC with Adv S Jozana

Instructed by: Malatji & Co. Attorneys

c/o Ditsela Inc

267 West Avenue

4th Floor

Die Hoewes

Centurion, Pretoria

Counsel for the First Respondent: Mr S Malatji

Instructed by: Malatji S Legal Practitioners

36 Wierda Road

Sandton, Johannesburg