

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



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

CASE NO. 22/19883

In the matter between :

MMATLOU HELLEN PHALENG-PODILE

Applicant

and

COMPEG SERVICES (PTY) LTD

First Respondent

PHIL MELTON N.O.

Second Respondent

AMIT DAYA N.O.

Third Respondent

PAUL HUNTER N.O.

Fourth Respondent

PALESA SUPING N.O.

Fifth Respondent

CHARLENE KALUMB N.O.

Sixth Respondent

AMBIANCE BODY CORPORATE

Seventh Respondent

EAS COST CONTROL (PTY) LTD

Eighth Respondent

JUDGMENT ON APPLICATION FOR LEAVE TO APPEAL

Farber AJ:

- [1] The applicant in motion proceedings proffered nine claims against the respondents. During the course of the proceedings the applicant abandoned one of them, namely that embodied in paragraph 7 of her notice of motion wherein she sought an order directing the second to sixth respondents to allow members of the seventh respondent who wished to remain on a post-paid water and electricity arrangement with the City of Johannesburg and Eskom Holdings SOC Limited, to exercise their right to do so, except for those members of the body corporate who regularly defaulted in their payment of levies. I non-suited the applicant on the remaining eight claims.
- [2] Judgment in the matter was handed down on 13 October 2023 and on 3 November 2023 the applicant delivered a notice of application for leave to appeal to the Full Bench against the whole of the judgment and order which I had some days previously handed down.
- [3] The notice of application for leave to appeal is a somewhat strange document. It purports to raise an appeal against the whole of my judgment and order on some six grounds. Two of them relate to my refusal to admit into evidence a supplementary affidavit which the applicant sought to file shortly before the hearing. The remaining four relate to my failure to reject the version relied upon by the respondents in relation to what had occurred

when a resolution was placed before the body corporate on 15 March 2022 for either acceptance or rejection by it. It is thus not surprising that the applicant in formulating the relief which she seeks under the application for leave to appeal, ultimately confined it to prayers 1, 2 and 3 of the notice of motion, i.e. to the setting aside of the resolution of 15 March 2022 (paragraph 1 of the notice of motion) and to certain relief consequent upon that happening (paragraphs 2 and 3 of the notice of motion). Defined relief is not sought in relation to paragraphs 4, 5, 6, 8 and 9 of the notice of motion. As I have indicated, paragraph 7 of the notice of motion was abandoned during the course of the hearing.

- [4] Strikingly, the applicant in her application for leave to appeal does not contend that I had erred in my decision relating to paragraphs 4, 5, 6, 8 and 9 of the notice of motion and no grounds of appeal in support of any such contention have been raised.
- [5] At the hearing of the application for leave to appeal I sought clarification from counsel on behalf of the applicant, advocate C M Shongwe, as to what the subject matter of the intended appeal was. He advised me that leave to appeal was sought in respect of the judgment and order in its entirety, including paragraphs 4, 5, 6, 7, 8 and 9 of the notice of motion.

[6] I drew to Mr Shongwe's attention to the difficulties which I had in understanding the precise ambit of the notice of application for leave to appeal. Mr Shongwe consulted with his instructing attorney and then advised me that the application for leave to appeal was confined to the matters raised in paragraphs 1, 2 and 3 of the notice of motion, which matters were to be considered in conjunction with my declination to admit into evidence the out of time and late supplementary affidavit. Mr Shongwe in this regard made it clear that the application was not rooted in any suggestion that I had wrongly dismissed the relief sought by her in terms of paragraphs 4, 5, 6, 8 and 9 of the notice of motion. He moreover intimated that the applicant accepted that the relief foreshadowed in paragraph 7 of the notice of motion had been abandoned at the hearing.

[7] It is perhaps well to point out that the failure of the applicant to specify in her notice of appeal the grounds upon which she relied in founding the contention that my dismissal of the relief sought in paragraphs 4, 5, 6, 8 and 9 of the notice of motion was misconceived and that another court would come to a different conclusion on those issues, is destructive of her right to seek leave to appeal thereon. This much appears from the decision of Leach J (as he then was) in *Songono v Minister of Law and Order* 1996 (4) SA 384 (E) where the learned Judge at 385B to 386B said the following:

'At the outset the applicant faces a procedural difficulty. Leave to appeal was not requested at the time of judgment and Rule 49(1)(b) accordingly became of application. It provides that:

'When leave to appeal is required and it has not been requested at the time of the judgment or order, application for such leave shall be made and the grounds therefor shall be furnished within 15 days after the date of the order appealed against ...'

In attempted compliance therewith the applicant filed a document headed 'Application for leave to appeal', in which he purported to set out the grounds upon which leave to appeal was to be sought. These so-called 'grounds' constitute a diatribe of some 17 pages criticising the judgment, analysing (at times incorrectly) certain of the evidence and the findings made, putting forward certain submissions and quoting various authorities. This lengthy, convoluted and at times disjointed criticism of the judgment did not clearly and succinctly spell out the grounds upon which leave to appeal is sought in clear and unambiguous terms – indeed, it served more to deceive, particularly as, during the course of argument, there were several points which the applicant's counsel, Mr Bursey, sought to raise which were not indicated in the document.

I am not aware of any judgment dealing specifically with grounds of appeal as envisaged by Rule 49(1)(b); however, Rule 49(3) is couched in similar terms and also requires the filing of a notice of appeal which shall specify 'the grounds upon which the appeal is founded'. In regard to that subrule it is now well established that the provisions thereof are peremptory and that the grounds of appeal are required, *inter alia*, to give the respondent an opportunity of abandoning the judgment, to inform the respondent of the case he has to meet and to notify the Court of the points to be raised. Accordingly, insofar as Rule 49(3) is concerned, it has been held that the grounds of appeal are bad if they are so widely expressed that it leaves the appellant free to canvass every finding of fact and every ruling of the law made by the court *a quo*, or if they specify the findings of fact or rulings of law appealed against so vaguely as to be of no value either to the Court or to the respondent, or if they, in general, fail to specify clearly and in unambiguous terms exactly what case the respondent must be prepared to meet – see, for example *Harvey v Brown* 1964(3) SA 381 E at 383; *Kilian v Geregsbode, Uitenhage* 1980 (1) SA 808 (A) at 815 and Erasmus Superior Court Practice B1-356 – 357 and the various authorities there cited.

It seems to me that, by a parity of reasoning, the grounds of appeal required under Rule 49(1)(b) must similarly be clearly and succinctly set out in clear and unambiguous terms so as to enable the Court and the respondent to be fully and properly informed of the case which the applicant seeks to make out and which the applicant seeks to make out and which the respondent is to meet in opposing the application for leave to appeal. Just as Rule 49(3) is peremptory in that regard, Rule 49(1)(b) must also be regarded as being peremptory. In my view the lengthy and rambling notice of appeal filed *in casu* falls woefully short of what was required. Mr Bursey suggested that grounds of appeal could be gleaned from the notice but that is not the point – the point is that the notice must clearly set out the grounds and it is not for the Court to have to analyse a lengthy document in an attempt to establish what grounds the applicant intended to rely upon but did not clearly set out. On this basis alone the application seems to me to be fatally defective and must be dismissed.”

- [8] My refusal to admit the supplementary affidavit and my finding that the notice of bar constituted irregular proceedings hold a close correlation for it is on the basis of that refusal and finding that counsel on behalf of the applicant contended that my dismissal of the application was entirely misconceived. It was in this regard urged that on both issues another court would come to a different conclusion and would find that the adoption of the resolution of the body corporate of 15 March 2022 fell to be set aside as sought in paragraph 1 of the notice of motion and that the consequential relief sought in paragraphs 2 and 3 thereof would in consequence be upheld. On this score, and with particular reference to the supplementary affidavit, it was contended that had it been admitted the trustees would have been compelled to answer it, and in doing so they may well have conceded that at the time of the adoption of the resolution they were aware that the service provider in question was in

the process of being voluntarily wound up. It was suggested that postulating an acknowledgement by the trustees of the existence of such knowledge, they would have been obliged to disclose it to the members of the body corporate and their failure to have done so would hold the consequence of vitiating the adoption of the resolution, thereby affording the applicant an additional ground for assailing the validity of the resolution. It was in the alternative contended that even if the trustees asserted that they did not have the requisite knowledge they ought to have established the existence thereof and by not doing so they had breached the duty of good faith owed by them to the members of the body corporate. This, so it was urged, would constitute a further basis upon which the resolution might fall to be assailed.

- [9] Two observations may be made. The withholding of material facts and the breach by the trustees of their duty of good faith did not form part of the applicant's cause of action, which was to the effect that the resolution had been rejected by the general meeting and that, by virtue thereof, voting could no longer be reopened by allowing one of the unit holders to change her vote so as to permit the adoption of the resolution. Questions relating to the failure by the trustees to disclose material information or the breach by them of the duty of good faith owed to members of the body corporate was not part of the case. It is in this regard clear to me that the applicant sought to introduce the supplementary affidavit on the basis of a speculative

possibility that the trustees in dealing with it might make disclosures, which would establish in favour of the applicant a different basis for assailing the validity of the resolution. This affords an additional basis for my declination to admit the affidavit. Its admission would in every probability have resulted in a postponement of the matter, a waste of time and the incurring of unnecessary costs. In my judgment there is no reasonable prospect that the Full Bench will come to a different conclusion on this feature of the matter.

[10] On anybody's version there was a factual dispute in relation to what in fact transpired at the meeting of 15 March 2022. The stance adopted during the course of the hearing and in the application for leave to appeal, was that I was to have no regard to the version of the trustees as it was wholly unworthy of belief. The applicant in this regard placed the trustees' version under microscopic analysis in endeavouring to found a case that it fell to be rejected and was not worthy of consideration. I did not then and I do not now share this view. There is in my view a *bona fide* dispute as to what in fact transpired on the occasion in question and I am of the view that there is no reasonable prospect of another court coming to a different conclusion on the issue. A case for leave to appeal has in my view not been established.

[11] Costs ought to follow the event. The application for leave to appeal was instituted before 12 April 2024 and much of the services which were rendered

in relation to it, was rendered prior to that date. I heard the matter on 2 May 2024 and really what remained to be done between 12 April 2024 and 2 May 2024 related to the preparation of heads of argument and to the oral argument of the matter on that day. This work was not of the type or complexity which warrants an award for costs on the B or C scales as envisaged under the very recent amendment of the Uniform Rules of Court. I in this regard refer to Rule 67A(3).

[12] In the result the following order will issue:

[12.1] The application for leave to appeal is dismissed.

[12.2] The costs of the application are to be paid on the appropriate scale as between party and party, save that in relation to the preparation and appearance of counsel and his instructing attorney after 12 April 2024 and to any recoverable post-hearing attendances, are to be limited to scale A as contemplated in Rule 67A of the Uniform Rules of Court.



**G Farber
ACTING JUDGE
OF THE HIGH COURT**

Date of Hearing: 2 May 2024
Date of Judgment: 6 May 2024

APPEARANCES

<u>For the Applicant:</u>	Adv C M Shongwe
Instructed by:	Phaleng Podile Attorneys
For the 1 st to 6 th Respondents:	Adv W C Carstens
<u>Instructed by:</u>	Barnard Attorneys
7 th Respondent	Ambiance Body Corporate
8 th Respondent	Eas Cost Control (Pty) Ltd