



IN THE HIGH COURT OF SOUTH AFRICA
(NORTHERN CAPE DIVISION, KIMBERLEY)

CASE NO: 1424/2022
DATE HEARD: 27 FEBRUARY 2024
DATE DELIVERED: 03 MAY 2024

In the matter between:

ENGELBRECHT, FRANKEL N.O.

First Applicant

MAKOBO, MMABATHO LUCIA

Second Applicant

and

MOKITIMI, LOUISE MMAPHUTI

First Respondent

LOUW, TEBOGO CLIFFORD

Second Respondent

MATHEBULA, SHANE

Third Respondent

NKOPANE, ITUMELENG

Fourth Respondent

ZHANG, QING

Fifth Respondent

HUANG, CHAOQIANG

Sixth Respondent

In re:

ENGELBRECHT, FRANKEL N.O.

First Applicant

MAKOBO, MMABATHO LUCIA

Second Applicant

CHARISM FUNERAL DIRECTORS CC

Third Applicant

and

MOKITIMI, LOUISE MMAPHUTI

First Respondent

THE MASTER OF THE HIGH COURT, KIMBERLEY

Second Respondent

FIRST NATIONAL BANK TRUST
LOUW, TEBOGO CLIFFORD
MATHEBULA, SHANE
NKOPANE, ITUMELENG
ZHANG, QING
HUANG, CHAOQIANG

Third Respondent
Fourth Respondent
Fifth Respondent
Sixth Respondent
Seventh Respondent
Eighth Respondent

Coram: Nxumalo J

JUDGMENT: APPLICATION FOR LEAVE TO APPEAL

Per Nxumalo J:

1. The applicants in these proceedings seek leave to appeal to the Supreme Court of Appeal (the “SCA”) against this Court’s order dated 10 March 2023, rescinding the *rule nisi* dated 09 September 2022 in respect of an application for a declaratory order concerning contempt of court. The application is based on a raft of grounds catalogued in the relevant notice dated 18 August 2023.
2. It is so that applications for leave to appeal are regulated by Section 17 (1) of the Superior Courts Act 10 of 2013; to wit:

“17 Leave to appeal

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

- (a) (i) the appeal would have a reasonable prospect 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 decision sought to be appealed does not dispose of all the issues in the case, the appeal would lead to a just and prompt resolution of the real issues between the parties.*"

3. Whilst it is trite that an appeal lies against the order and not necessarily the reasons of the Court *a quo*¹, suffice it nevertheless to emphasise the following. First, rule 42(1) expressly empowers our courts, in addition to any other powers it may have, to *mero motu* or upon the application of any party affected, rescind or vary an order or judgment, *inter alia*, erroneously sought or granted, in the absence of any party thereby.² The purpose of the rule is "*to correct expeditiously an obviously wrong judgment or order.*"³
4. Second, since a *rule nisi* is an interim interdict in essence, it is so that it is incumbent in our law for an applicant to succeed to establish the lack of another remedy adequate in the circumstances.⁴ Third, it has always been so in our law that an interlocutory order, such as a *rule nisi* may, at any time before final judgment (or before the confirmation of the *rule nisi*) be varied or set aside by the judge who made it or by any other judge sitting in the same Court and exercising the same jurisdiction.⁵
5. It follows from the foregoing that a *rule nisi* may be altered or rescinded by a court *mero motu* or upon application in terms of rule 42 in certain circumstances.⁶ Such therefore cannot be said to be: "[T]aking up the role of a Court of Appeal in respect of order of a court of equal standing" as contended for the applicants in these proceedings.⁷

¹ *Manana v King Sabata Dalindyebo Municipality* [2011] 3 All SA 140 (SCA) at para 3.

² *Mutebwa v Mutwebwa and Another* 2001 (2) SA 193 (TK) at para 17.

³ *Bakoven Ltd v G J Howes (Pty) Ltd* 1992 (2) SA 466 (E) at 471E-F; *Kili and Others v Msindwana in Re: Msindwana v Kili and others* 2001 (1) All SA 339 (Tk) at 345.

⁴ *Coalcor (Cape) (Pty) Ltd and Others v Boiler Efficiency Services CC and Others* 1990 (4) SA 349 CPD at 353F-H.

⁵ *Bell v Bell* 1908 TS 887; *Duncan NO v Minister of Law and Order* 1985 (4) SA 1 (T) at 2E-J.

⁶ *SPCA v De Swart* 1969 (1) SA 655 (OPD) 657G-H.

⁷ Para 13.3, p8 Applicants' Heads of Argument: Application for Leave to Appeal, 21 February 2024.

6. It is so that it was only after hearing the applicants' legal representative, that this Court indicated that it intended to set aside the interim interdict. It is also so that the impugned order was only granted after the said representative was afforded the indulgence of the matter standing down for her to consider her position. This Court was therefore satisfied that all the active parties whose interests may be affected had notice of the impugned order. The remainder of the parties herein are hit by the doctrine of peremption or acquiescence.⁸

7. In **MEC Health, Eastern Cape v Mkhitha**⁹ the Supreme Court of Appeal said the following:¹⁰

"[16] Once 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. Section 17(1)(a) of the Superior Courts Act 10 of 2013, makes it clear that leave to appeal may only be given where the judge concerned is of the opinion that the appeal would have a reasonable prospect of success; or there is some other compelling reason why it should be heard.

*[17] An 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."*¹¹

8. Regard being had to the foregoing, this Court is not convinced that on proper grounds, there is a reasonable prospect or realistic chance of success on appeal. Nor is this Court convinced that there is any other compelling reason why the appeal should be heard.

⁸ *Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State* 2021 (11) BCLR 1263 (CC) at para 101 and the cases cited.

⁹ (1221/15) [2016] ZASCA 176 (25 November 2016); 2016 JDR 2214 (SCA).

¹⁰ Reference to other authorities omitted.

¹¹ Emphasis supplied.

ORDER

9. In the premise, the following order issues:

A) THE APPLICATION FOR LEAVE TO APPEAL IS DISMISSED.



JUDGE APS NXUMALO
HIGH COURT OF SOUTH AFRICA
NORTHERN CAPE DIVISION, KIMBERLEY

[03 MAY 2024]

Counsel for the Applicants:
Instructed by:

ADV VAN NIEKERK SC assisted by ADV ERASMUS
Engelsman Magabane Inc.
Kimberley

1st Respondent:

NO APPEARANCE