

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MTHATHA)**

Case No: 896/2024

In the matter between:

NTSIKELELO MANZI

APPLICANT

and

NONDUMISO MANZI (BORN NTSIZI)

1ST RESPONDENT

NOTHABO MANZI

2ND RESPONDENT

AVBOB FUNERAL SERVICES – MTHATHA

3RD RESPONDENT

JUDGMENT ON APPLICATION FOR LEAVE TO APPEAL

NOTUNUNU AJ:

[A] Introduction

[1] This is an application for leave to appeal the order I issued on the 24th of February 2024. In that order I had granted the application for the reconsideration of the order granted by my brother Pitt AJ the previous day. I had set aside this order and discharged the rule.

[2] The applicant filed their notice of an application for leave to appeal on the 28th February 2024. In the said application, it is stated that their reasons for appeal may be amended on receipt of my reasons for the order I issued. The reasons for my order were received by the applicant's attorney on the 12th of April 2024. As at that date of hearing of this application, no further reasons had been filed by the applicant.

This to me seems to mean that they are content with their reasons for leave to appeal.

[3] I had also issued a directive calling on the parties to file their written submissions and had given some dates before which they should so file the said submissions. Both parties have not complied with my directive. The applicant had filed his, one or two days later than the date I had given to them. It is worse with the respondent. They have only filed theirs yesterday, 2nd May 2024 at 12hours.

I must mention the fact that at the time I was preparing my reasons for the order I issued, I had already had the advantage of seeing the applicant's reasons for appeal. In my reasons for judgment, I have dealt with those reasons for appeal. This, I did so that the applicant should weigh their options as to whether to still proceed with the application.

[B] Applicants' reasons for leave to appeal

[4] The first ground is that I have erred in totally overlooking the fact that the respondent had filed their Notice in terms of Rules 6(5) (d)(iii) which was not compliant with the time frames provided for in the rules. He complained that they were given only two hours. During the hearing of this application, I invited counsel for the applicant to expand on this and refer me to the relevant rule which he alleged I had misconstrued. He argued that in terms of uniform rule 6(5)(c) the respondent was supposed to give them a notice of anticipation which should not be less than 24 hours. The respondents hauled them to court on a 2hour notice, he argued.

With respect, counsel for the applicant got it wrong. Rule 6(5)(c) does not make provisions for anticipation of an interim order granted by the court under rule 6(12)(1) in urgent applications. Further, reconsideration of applications is governed by rule 6(12)(c). This rule is silent on the issue as to when a notice should be given to the other party by the party who desires reconsideration. Common sense dictate that this should be so. Rule 6(12) is about truncating of the normal time. It cannot be, therefore, that the applicant would seek and obtain an indulgence from the court to dispense with the form and time frames provided for in the rules and with the same breath complaint that the respondent has truncated the time periods. Such is the

nature of the urgent applications, that is, truncating of time frames. There is, therefore, no merit on this argument.

[5] Their second reason was that I misdirected myself by stating that their first application had to be served on the respondent before the hearing of their urgent application. He further states that I disregarded directive of my brother Pitt AJ who had directed that the matter be heard as one of urgency. It is, indeed, correct that Pitt AJ did not direct the applicant to serve the papers on the respondent. He also, however, did not order that the papers should not be served on the respondent before the application is heard. I have dealt extensively with this in my reasons for judgment emphasizing the golden rule of the principle of *audi alterum partem* rule. I have nothing to add thereon.

[6] Their third ground was that in my reconsideration of the previous order granted by Pitt AJ, I have acted as a reviewing judge. I had reviewed the order of Pitt AJ.

A court that sits and adjudicate an application brought under Uniform Rule 6(12)(c) does not sit as one of review or appeal. The rules relating to reviews and appeals are dealt with elsewhere and are not applicable in the reconsideration application. The dominant purpose of rule 6(12)(c) is to afford an aggrieved party a mechanism designed to redress the imbalance in, and injustices and oppression flowing from an order granted as a matter of urgency in the absence of the said party. Of importance is that reconsideration of the order whether interim or final in its operation may involve deletion (the underlying is mine) of the whole order or part thereof or even amend the order.¹

It cannot be, therefore, that, by setting aside the prior order by Pitt AJ I was reviewing his order. I am empowered in law to delete the whole order of Pitt AJ.

[7] The fourth ground was that I made my ruling without having taken into account all the papers filed by the applicant. This cannot be so. Again, I refer the applicant to my reasons for judgment where I have a paragraph under the heading “Merits of first application.” Surely, I would not have been able to deal with the merits

¹ Erasmus D1 Rule 6 – 60; ISDN Solutions Pty Ltd v CSDM Solutions CC1996 (4) (W) at 486 I – 487 A.

of the first application without reading the papers. They have also dealt with my reasons for judgment.

[8] The fifth reason was that I misdirected myself by allowing the deceased to be buried at the homestead of the first respondent which is the home of the second respondent. The argument goes further that the second respondent does not have her own homestead. In his founding affidavit, in the first application, the applicant had put the reason for disqualification of the second respondent as being just “*a child*.” During the hearing of the reconsideration application, I had specifically asked counsel for the applicant what he meant by saying that the second respondent was a child. Counsel had advised me that they meant that she did not have her own homestead but that she was not a minor. I have dealt with this in my reasons for judgment. In particular, I re-iterate that the fact that the applicant is a boy as opposed to the second respondent who is a girl is of no moment. Their status is the same in the eyes of the law. They are both the children of the deceased. They both stay at different homesteads that had been built by their respective mothers and the deceased.

[9] It is stated that I misdirected myself by not taking into account that the applicant had wanted the deceased to be buried at a neutral place. I do not understand what is meant by this neutral place. I say this because the place at which the deceased was to be buried was at his other homestead, that is, a homestead built by him and the first respondent in the same manner as he built the homestead with the mother of the applicant the homestead where the applicant resides. I note that the applicant deposed that the deceased would be buried at Mthonyameni Location Tsolo as per his wish. I have dealt with this issue of the wishes of the deceased in my judgment.

[10] The sixth reason is that I focused on the merits of the application in piece-meal. No further information beyond this bare allegation is placed before me. It is just bones without meat. It also contradicts what the applicant had stated above when they had argued that I had not read the papers supporting their application.

[11] The seventh ground being that I have considered the application in peace-meal have been dealt with above.

[12] The eighth reason is that I misdirected myself by again considering the matter in piece-meal and not considering the wishes of the deceased. This I dealt with at length in my reasons for judgment.

[13] The ninth and last reason is that I had misdirected myself by not taking into account the harm that the applicant would suffer if I were to set aside the order of Pitt AJ. In his founding affidavit in their papers the applicant had deposed that he would suffer prejudice. At paragraph 48 he explained his prejudice as the fact that under custom and tradition and even common law, as the eldest son of the deceased he had a right to determine the burial of his late father. How this would be termed as prejudice, escapes my mind. Perhaps the prejudice the applicant would suffer if I were to set aside the order of Pitt AJ would lie on the fact that I had not recognized custom and tradition. With respect, I do not believe that the status of being the eldest son gives the applicant the rights he claims to have. In my reasons for judgment, I had dealt with the issue of inconvenience that would be suffered by the respondents if I were not to set aside the order by Pitt AJ.

[C] Legal analysis

[14] Applications for leave to appeal are governed by Section 17 of the Superior Courts Act 10 of 2013. The section reads: -

“17 (1) Leave to appeal may only be given where the judge or judges concerned are 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);

(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.”

[15] It is not clear in the application of the applicant under which head of the section is the application brought. In fact, it is not stated at all. This alone is fatal to the application. During arguments I had brought this to the notice of the applicant's counsel and requested him to address me on this issue. He advised the court that his application was premised on Section 17 (1) (c) of the Superior Courts Act. This sub-rule states that an application for leave may only be given: - *“(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.”*

Much as counsel for the applicant had not stated this in his application for leave papers, he was at pains to argue it or direct the court to where this is dealt with in their papers. During the address on this issue, counsel for the applicant stated that another court would come to a different finding than this court's decision. Perhaps, what he wanted was to rely on the provisions of section 17(1)(a) that provides that leave to appeal may be granted if *“the appeal would have a reasonable prospect of success.”* Again, counsel for the applicant was at pains to argue this point. It would appear, therefore, that counsel for applicant had no clue of what he wanted this court to do and the reasons thereof other than just moving an application for leave to appeal on grounds which I believe, with respect to be baseless. This is so, especially, if counsel for applicant had paid attention to my reasons for judgment and the authorities referred thereto. They cover many, if not all, of his grounds for application for leave to appeal,

[16] In his application for leave the applicant requests that the interim order granted by Pitt AJ should remain in force pending the finalization of the appeal. This does not make sense to me, with respect, it cannot be that this court discharges the rule but in the same breath it orders that it remains in force pending the finalization of the appeal.

[17] I now deal with the issue of mootness. The first application by the applicant was to interdict the burial of the deceased at Ziphunzana Administrative Area Libode. There was an interim order that had been granted in favour of the applicant by Pitt

AJ. It is that interim order that I set aside and also discharged the rule paving the way for the respondents to proceed and bury the deceased.

During the hearing of this matter, I had requested applicant's counsel to address me on the issue of mootness of this application. He had argued that the matter was not moot because they seek an order declaring either the applicant or the respondent as the rightful person or persons to decide where the deceased should be buried. With respect, this argument is misplaced. The application by the applicant was never about the determination of rights of a person to bury the deceased. It was all about interdicting the respondents from burying the deceased at Ziphunzana.

I had set aside the interim order by Pitt AT and discharged the rule. This issue should not detain me further as there are many other reasons why this application should fail, this also being one of them.

[18] I have, however, nevertheless decided to deal with the reasons for leave to appeal as filed by the applicant. As indicated above, I am not clear on which grounds listed in section 17(1) of Superior Courts Act applicant's application is predicated. I assume that the only ground the applicant may rely on is that the appeal would have a reasonable prospect of success.

[19] In *MEC for Health: Eastern Cape*² it is stated in paragraphs 16 and 17: -

"[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.

² MEC for Health: Eastern Cape (case 1221/2015 ZASCA (25 November 2016) at paras 16 and 17.

There must be a sound, rational basis to conclude that there is a reasonable prospect of success on appeal.”

[20] The test of what reasonable prospects of success postulates was dealt with by the SCA in *S v Smith*³ where Plasket AJA stated: -

“[7] What the test of reasonable prospects of success postulates is a dispassionate decision, based on the facts and the law, that a court of appeal could reasonably arrive at a conclusion different to that of the trial court. In order to succeed, therefore, the appellant must convince this court on proper grounds that he has prospects of success on appeal and that those prospects are not remote but have a realistic chance of succeeding. More is required to be established than that there is a mere possibility of success, that the case is arguable on appeal or that the case cannot be categorised as hopeless. There must, in other words, be a sound, rational basis for the conclusion that there are prospects of success on appeal.”

[D] Costs issue

[21] Counsel for the respondents urged me to order payment of costs on a punitive scale. He argued that this is one application which ought not to have seen the door of this court. He says it is bad in law. He pointed to the fact that despite the applicant having promised to amend his papers on receipt of the reasons for judgment, he never did anything.

[22] The decision to order costs is something that is with the discretion of the court, which of course, must be exercised judiciously.

In *Plastic Converters Association of South Africa on behalf of members v National Union of Metalworkes of SA*⁴ it was stated: -

“[t]he scale of attorney and client is an extraordinary one which should be reserved for cases where it can be found that a litigant conducted itself in a clear and

³ *S v Smith* 2012 (1) SACR 567 (SCA) at paragraph 17.

⁴ *Plastic Converters Association of South Africa on behalf of members v National Union of Metalworkers of SA* [2016] ZALAC 39; [2016] 37 ILJ 2815 (LAC).

indubitably vexatious and reprehensible [manner]. Such an award is exceptional and is intended to be very punitive and indicative of extreme opprobrium.”

In *Fisheries Development Corp v Jorgensen and Another*⁵ vexatious was held to mean: -

“[F]rivolous, improper: instituted without sufficient ground, to serve solely as an annoyance to the defendant. Vexatious proceedings no doubt include proceedings which, although properly instituted, continued with the sole purpose of causing annoyance to the defendant; ‘*abuse*’ connotes a misuse, an improper use, a use *mala fides*, a use for an ulterior motive.”

[23] In this matter the applicant filed his application for leave to appeal on the 28th February 2024. He had craved leave to supplement his grounds on receipt of reasons for judgment. The said reasons were handed to him on 12th April 2024. He was not moved. He did not do anything about the grounds in his application. My reasons for judgment were very extensive and they dealt with his grounds for application for leave.

Again, the applicant was not moved. He proceeded with his application and filed his written submissions. One would have expected him to take a breath and re-consider his options as to whether to proceed or not with the application. Applicant did not do that. He filed his written submissions that did not address fully the grounds tabulated in his application for leave. He dealt in his written submissions with issues that some of which were not in his papers. It is not permissible for a party to put in his heads of argument for the first time, something that is not in his papers. Dealing with this issue Band AJ in *Amen Njokweni v Thanduxolo Qina*⁶ had this to say at paragraph 40: -

“The further allegations upon which the applicant seeks to rely under this heading, which were raised in the applicant’s heads of argument for the first time, presumably to address the shortcomings on the applicant’s papers, are not properly before me and cannot serve to assist the applicant.”

⁵ *Fisheries Development Corp v Jorgensen and Another* 1979 (3) SA 1331(W) at 1339 E – G.

⁶ *Njokweni v Qina and Others* (3839/2022) [2023] ZAECHMC 13 (23 March 2023).

A litigant cannot rely and hide behind the tardiness and negligence of his attorney. I am of the view that this moving of this application and the further continuation with it even after the applicant had received the reasons for judgment was not called for. It was frivolous, improper and pursued without sufficient grounds, bearing in mind that it is not even clear and stated under which ground of those listed in section 17 of the Superior Courts Act is this application brought.

[E] Conclusion

[24] Having taken all the above facts into account and also the relevant legal principles I am not convinced that the applicant has made a case for the grant of this application. I do not believe that the appeal would have a reasonable prospect of success. In turn I believe that such an appeal would be dismissed possibly with a punitive costs order against the applicant.

[25] In the circumstances the following order shall issue:

- (a) The application for leave to appeal the order granted on the 24th February 2024 is refused.
- (b) The applicant shall pay costs on an attorney and client scale.

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ACTING JUDGE OF THE HIGH COURT

Appearances

For the applicant	:	Mr Mzinzela
Instructed by	:	Mzinzela & sons Attorneys
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For the 1 st and 2 nd Respondents	:	Mr Zilwa

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Heard on : 03 May 2024
Delivered on : 14 May 2024