

**IN THE HIGH COURT OF SOUTH AFRICA
[EASTERN CAPE DIVISION, MTHATHA]**

Case No:4112/2023

Date heard: 10/5/2024

Date delivered: 24 /5/2024

In the matter of:

THE ROAD ACCIDENT FUND

APPLICANT

And

ZILWA ATTORNEYS INCORPORATED

FIRST RESPONDENT

HYMIE ZILWA

SECOND RESPONDENT

THE SHERIFF: EAST LONDON

THIRD RESPONDENT

This judgment was handed down electronically by circulation to the parties' legal representatives via e-mail. The date and time for hand-down is deemed to be 09H30 on 24 May 2024.

JUDGMENT ON APPLICATION FOR LEAVE TO APPEAL

MJALI J:

[1] This is an opposed application for leave to appeal to the full bench of this division against the whole of my judgment delivered on 06 November 2023 in which I granted the defendant's application. The applicant also sought condonation for the late filling of the application for leave to appeal. Good cause was shown and the application for condonation for the late filling was granted.

[2] The application for leave to appeal is opposed by the respondent on the basis

that there are no prospects of success for the proposed appeal. The judgment and order is challenged broadly on the grounds that the court erred on facts and in law.

[3] The law when it comes to a consideration of whether or not leave to appeal ought to be granted is well settled. Section 17(1) of the Superior Courts Act governs applications for leave to appeal and provides that leave to appeal may only be granted where the judge or judges concerned are of opinion that the appeal would have reasonable prospects of success or there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration. In regard to the question of reasonable prospect of success, the SCA remarked as follows:

“Leave to appeal should be granted only where there is a sound rational basis for the conclusion that there are prospects of success on appeal”.¹

[4] The sole question to be considered in such an application is whether there is a sound rational basis that another court would come to a different conclusion on the same facts. The prospects of success must not be remote but there must exist a reasonable chance of succeeding. Although I was satisfied that the order granted and reasons thereof were sound, I must now reflect dispassionately upon my judgment and decide whether there are any prospects of success on appeal. At this stage I am not called upon to adjudicate upon the appeal itself. Commenting on the difficulties inherent in the nature of this application Ogilvie Thompson AJA² 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. As regards the latter, difficult though it may be for a trial Judge to disabuse his mind of the fact that he has himself found the Crown case to be proved beyond reasonable doubt, he must, both in relation to questions of fact and of law, direct himself specifically to the enquiry of ‘whether there is a reasonable prospect that the Judges of Appeal will take a different view’.

¹ Four Wheel Drive Accessory Distributors CC v Rattan NO 2019 (3) SASA 451 (SCA) at par [34] with reference to S v Smith 2012 (1) SACR 567 (SCA) par [7].

² R v Muller 1957 (4) SA 642 AD at page 646 paragraph E-G.

[5] On the ground that the court erred in holding that the application fell to be dismissed for failure to join the claimants in its urgent application to stay the writ, Mr Notshe argued that the respondents represented the claimants. The relief sought in the application to stay the writ is simply to prevent the attorneys from taking the steps that they are taking on behalf of the claimants. For these reasons he argued that it cannot be said that they were not party to the application as the respondents represented them. The argument went further to state that even if it can be said that they were not party to the proceedings, no-joinder does not lead to a dismissal of an application. In the applicant's view, the worst scenario would be to refuse the relief sought and direct the applicant to join the necessary party.

[6] It is crucial to have regard to the relief sought by the applicant in the urgent application for the stay of the writ. The relief sought was couched in the following terms; "interdicting the third respondent from removing the applicant's movable property or selling the applicant's movable property pursuant to any writ of execution issued or which may be issued in future at the instance of the first and second respondents against the applicant absent compliance with the Board Notice 271 of 2022 published in the Government Gazette No. 46322."

[7] The problems with the relief sought is so broadly worded such as to include any writ that may be issued in future at the instance of the first and second respondents. The first respondent is a firm of attorneys. True to the nature of their business they represent many clients in many RAF matters. Broad as it has been crafted, it is difficult to which matters are the subject matter of the interdict. Even worse the relief sought makes reference to writs obtained or may in future be obtained by the second respondent. The capacity in which the second respondent may be acting is unclear. At the very least it cannot be said that he represents the claimants if one has regard to the manner in which he has been cited. I have in my judgment sought to be impugned dealt extensively on this issue and I am as such satisfied that no other court would find differently on this fact.

[8] The same can be said with regards to the issue of the requirement sought from the respondents prior to the payment of the monies due to the claimants it represents,

the applicant cannot wish away the fact that the writs of execution were obtained pursuant to court orders that were obtained in favour the claimants. Further that the applicant failed to comply with such court orders. Thus, the applicant cannot by any stretch of imagination claim to have any prima facie right to stop the operation of a writ of execution obtained pursuant to its non-compliance with a very clear court order particularly when the applicant does not in any way challenge the validity of the court order.

[9] The issue of the requirements that the applicant seeks from the first respondent in terms of its Policy promulgated under its Board Notice 271 of 2022, prior to it effecting payment in terms of the court order, has been a subject matter in a number of applications that have served before various courts and invariably our courts have held against the applicant to the extent of setting aside such aside many of its clauses including those that form the subject matter of this case.

[10] Having carefully listened to and given the submissions made by both counsel some careful consideration I have not been persuaded to think that another court would find differently in this matter. I also cannot any compelling reason warranting the hearing of this matter by the appeal court.

[11] On the issue of costs. The general rule is that costs must follow the event. There is no reason to deviate therefrom. In the result

11.1 The application for leave to appeal is dismissed with costs.

11.2 The applicant shall pay the costs of this application including those that are consequent upon the employment of two counsel where so employed.⁵⁵³

GNZ MJALI
JUDGE OF THE HIGH COURT

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