

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE**

(1)	<u>REPORTABLE: YES/NO</u>
(2)	<u>OF INTEREST TO THE JUDGES: YES/NO</u>
(3)	<u>REVISED.</u>
.....	
DATE 20/9/2024	SIGNATURE..... [REDACTED]

CASE NO: 4475/2021

In the matter between:

VOLTEX (PTY) LTD

Applicant

And

KHAZAMULA DAVID NKUNA

First Respondent

RIRHANDZU RACHEL NKUNA

Second Respondent

JUDGMENT ON APPLICATION FOR LEAVE TO APPEAL

GAISA AJ

INTRODUCTION

[1] This is an application for leave to appeal against my judgment and order dated 2 May 2024, in which I granted a final sequestration order against the joint estate of the First and Second Respondents. This application is brought by the Nkuna (not disrespect intended) who were respondents in the main application. This application for leave to appeal is opposed by Voltex (the applicant in the main application). For ease of reference, the parties shall be referred to herein as they were in the main application.

LEGAL FRAMEWORK

[2] The test for granting leave to appeal is set out in Section 17(1) of the Superior Courts Act 10 of 2013, which provides that leave to appeal may only be given where the judge is of the opinion that:

- 2.1 the appeal would have a reasonable prospect of success; or
- 2.2 there is some other compelling reason why the appeal should be heard.

[3] In **MEC for Health, Eastern Cape v Mkhitha and Another**¹ the SCA reiterated that leave to appeal must not be granted unless there truly is a

¹ (1221/2015) [2016] ZASCA 176 (25 November 2016).

reasonable prospect of success or there is some other compelling reason why the appeal should be heard. 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. This test imposes a higher bar than the previous test, which only required a reasonable prospect that another court might come to a different conclusion.

GROUND OF APPEAL

[4] The Respondents have raised several grounds for appeal, which can be summarised as follows:

- 4.1 The court erred in granting a final sequestration order on 2 May 2024 when a provisional order had been extended to 28 October 2024 by Kganyago J.
- 4.2 The court erred in entertaining the application based on Judge President Phatudi's directive to recall the provisional order, which was allegedly issued without hearing the parties.
- 4.3 The directive by Judge President Phatudi violated judicial independence under Section 165 of the Constitution.

ANALYSIS

[5] After careful consideration of the arguments presented by both parties, I find that the Respondents' grounds for appeal are primarily procedural in nature and do not address the substantive merits of the sequestration order. This is a significant weakness in their application for leave to appeal.

INHERENT POWER OF THE COURT

[6] This Court, as a Superior Court, has an inherent power to regulate its own processes and set hearing dates, as established in long-standing precedent. As noted by the Constitutional Court in **Social Justice Coalition and Others v Minister of Police and Others**,² Section 173 of the Constitution provides, among others that, the High Court of South Africa has the inherent power to protect and regulate its own process...taking into account the interests of justice.³ This power is an important one, allowing courts to act effectively within their jurisdiction and prevent any possible abuse of process.

[7] It is crucial to note, however, that this inherent power is not unbounded. It does not translate into judicial authority to impinge on rights that

² (EC03/2016) [2018] ZAWCHC 181; 2019 (4) SA 82 (WCC) (14 December 2018)

³ [2022] ZACC 27 at para [71]

have vested or been conferred by the Constitution. The power is primarily about regulating procedure, not creating or limiting substantive rights.

[8] In the present case, Judge President Phatudi's directive to allocate an earlier hearing date falls squarely within the court's inherent power to manage its roll and ensure efficient administration of justice. This action was a procedural step aimed at expediting a long-standing matter, not an attempt to limit or deny any vested rights.

[9] It is important to emphasize that litigants do not have an inherent right to be heard on a date of their preference. While parties may express preferences for hearing dates, the court retains discretion to set dates in the interests of efficient case management and administration of justice.

[10] Furthermore, it is noted that the respondents did not demonstrate any prejudice resulting from the earlier hearing date. Given that they had ample time to prepare their case since the initial application in 2021, any claim of prejudice due to the expedited hearing lacks merit.

[11] The interests of justice strongly favour bringing long-standing proceedings to a conclusion without undue delay. In this case, granting further delays would not serve the interests of justice, particularly given the extended history of this matter.

[12] Regarding the alleged conflicting orders:

12.1 The directive issued by Judge President Phatudi on 21 December 2023 specifically recalled the return date of 28 October 2024 and allocated a preferential hearing date of 19 March 2024.

12.2 This directive was a procedural step within the court's power to regulate its own processes, as established in long-standing precedent.

12.3 The order made in open court on 19 March 2024, postponing the matter to 2 May 2024, effectively cured any potential procedural irregularity in the initial directive.

[13] On the issue of judicial independence:

13.1 The Judge President's directive to allocate an earlier hearing date does not impinge on judicial independence.

13.2 It falls within the court's inherent power to manage its roll and ensure the efficient administration of justice.

13.3 Importantly, the Respondents have not challenged the substantive grounds for granting the sequestration order. They have not shown that another court would likely come to a different conclusion on the merits of the sequestration. This omission significantly weakens their application for leave to appeal.

13.4 The Respondents argue that there are two conflicting orders: the final sequestration order granted on 2 May 2024 and the provisional order extended to 28 October 2024. However, this argument fails to recognize that the Judge President's directive of 21 December 2023 specifically recalled the 28 October 2024 return date. This directive, while issued in chambers, was a valid exercise of the court's power to regulate its own procedures.

13.5 Even if there were concerns about the procedural propriety of the Judge President's directive, these were effectively cured by the open court order of 19 March 2024, which postponed the matter to 2 May 2024. This order, made with the knowledge of all parties, superseded any previous return dates and set the stage for the final hearing.

[14] Interests of Justice and Lack of Prejudice

14.1 The interests of justice do not favour granting leave to appeal in this matter. The sequestration proceedings have already been significantly delayed, and further delays would likely prejudice the creditors. As held in **Notshokovu v S**⁴ the Supreme Court of Appeal reiterated the importance of ensuring that leave to appeal is granted when there is a reasonable prospect that another court might arrive at a different conclusion.

14.2 As I understand it, the Supreme Court of Appeal (SCA) in **Notshokovu v S** it highlighted that refusing leave to appeal should be done cautiously, particularly where there's a potential for injustice. The judgment underscored that leave should be granted if there's a reasonable prospect of success on appeal, aligning with the principle that the High Court should be slow to refuse leave in cases where a different conclusion could be reached by another court.⁵

14.3 Crucially, the Respondents have not demonstrated any prejudice resulting from the earlier hearing date. Given that the initial application was made on 28 June 2021, they had ample

⁴(157/15) [2016] ZASCA 112 (7 September 2016)

⁵Notshokovu *supra* at paras [2] and [15].

time to prepare their case. The lack of demonstrated prejudice further undermines their application for leave to appeal.

14.4 Moreover, the Respondents have not shown how the procedural issues they raise have materially affected the outcome of the case. Their failure to address the substantive merits of the sequestration order suggests that even if there were procedural irregularities, these did not result in any injustice to the Respondents.

CONCLUSION

[15] In light of the above, I am not satisfied that the appeal has reasonable prospects of success, nor have the Respondents shown any other compelling reason why the appeal should be heard. The application for leave to appeal focuses solely on procedural issues, neglecting to challenge the substantive grounds for sequestration. This, coupled with the lack of demonstrated prejudice and the interests of justice in finalising long-standing proceedings, leads me to conclude that leave to appeal should not be granted.

[16] As emphasized in **Cook v Morrison**⁶ while it dealt with special leave to appeal, what the SCA said in that matter is relevant here too:

⁶ (1319/2017) [2019] ZASCA 08 (8 March 2019)

“[8] The existence of reasonable prospects of success is a necessary but insufficient precondition for the granting of...leave. Something more, by way of [compelling] circumstances, is needed. These may include that the appeal raises a substantial point of law; or that the prospects of success are so strong that a refusal of leave would result in a manifest denial of justice; or that the matter is of very great importance to the parties or to the public. This is not a closed list...”

[17] The Respondents have not demonstrated any special circumstances that would warrant granting leave to appeal.

[18] Regarding costs, while I acknowledge the Respondents' argument that they are vindicating their rights, the application for leave to appeal is without merit. The normal rule that costs follow the result should apply. The Respondents' contention that they should not bear costs due to the unusual nature of the proceedings is not persuasive, as they have failed to demonstrate any substantive grounds for appeal or any prejudice resulting from the procedural steps taken. On the other hand the Applicant has been successful in opposing this application.

ORDER

In the result, the following order is made:

1. The application for leave to appeal is dismissed.
2. The Respondents are ordered to pay the costs of this application



N GAISA

Acting Judge

High Court of South Africa

Limpopo Division, Polokwane

APPEARANCES

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DATE OF HEARING : 20 September 2024
DATE OF JUDGEMENT : 20 September 2024

This judgment is handed down electronically by circulation to the parties' representatives by email. The date and time for hand-down of the judgment is deemed to be 20 SEPTEMBER 2024.