

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
(LIMPOPO DIVISION, POLOKWANE)

CASE NO:7168/2020

- (1) REPORTABLE: YES / NO
(2) OF INTEREST TO THE JUDGES: YES / NO
(3) REVISED.

Signature: ...

DATE: 03/10/2024

In the matter between:

KOLOBE MASHALA

APPLICANT

And

MMAKOBO MICHAEL MODIBA

FIRST RESPONDENT

KGAUGELO CHIPANA

SECOND RESPONDENT

**KAYISE PETROLEUM PTY LTD
(FORMERLY MODIBA PETROLEUM)**

THIRD RESPONDENT

In re:

MMAKOBOANI MICHAEL MODIBA

APPLICANT

And

KGAUGELO CHIPANA

1ST RESPONDENT

KAYISE PETROLEUM(PTY) LTD

2ND RESPONDENT

KOLOBE MASHALA

3RD RESPONDENT

PUMA ENERGY SOUTH AFRICA

4TH RESPONDENT

MATOME JOHN RAPOTU

5TH RESPONDENT

PILGRIM ONE STOP(PTY) LTD.

6TH RESPONDENT

FIRST NATIONAL BANK.

7TH RESPONDENT

JUDGMENT

(LEAVE TO APPEAL)

MONENE AJ

[1] Section 17 (1) (a) of the Superior Courts Act No 10 of 2013 (“the Act”) provides as follows:

“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 judgements on the matter under consideration;*"

[2] In ***Ramakatsa and Others v African National Congress and Another*** (724/2019) [2021] ZASCA 31(31 March 2021) ("**Ramakatsa**") at para 10, the Supreme Court of Appeal held as follows:

"I am mindful of the decisions at high court level debating whether the use of the word 'would' as opposed to 'could' possibly mean that the threshold granting the appeal has been raised. If a reasonable prospect of success is established, leave to appeal should be granted. Similarly, if there are some other compelling reasons why the appeal should be heard, leave to appeal should be granted. The test of reasonable prospects of success postulates 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 other words, the appellants in this matter need to convince this court on proper grounds that they have prospects of success on appeal. Those prospects of success must not be remote, but there must exist a reasonable chance of succeeding. A sound rational basis for the

conclusion that there are prospects of success must be shown to exist.”

- [3] This is an application for leave to appeal against a judgment of this court delivered on 6 February 2024 in terms of which this court dismissed an application brought by the current first respondent as well as a counter application which had been brought by the current applicant who was the third respondent in the initial application. The current applicant seeks leave to appeal only against the dismissal of his counterapplication.
- [4] The findings of the court leading to the dismissal of both the main and counter application being patent from the judgment I turn to look at the grounds for the application for leave which, in sum, are the following:
- 4.1 That this court erred in finding that there was on the papers a dispute of fact incapable of determination without oral evidence.
 - 4.2 That this court erred in not referring the dispute of fact to oral evidence.
 - 4.3 That this court erred in finding that the alternative prayer of repayment of monies formed part of the dispute of fact such that it could not order the alternative relief sought.

- [5] Without unnecessarily regurgitating the judgment, I am not persuaded that this court's judgment is assailable on account of the following considerations:

- 5.1 The reason why the applicant injected cash to the tune of R880 500.00 into the third respondent's coffers is incapable of being resolved on the papers in circumstances where he says it was for shares and the other shareholders are disputing that. However robust any court approaches that issue there will still be a need for oral evidence and cross-examination to help determine the truth.
- 5.2 The Heads of Agreement between the parties effectively constitutes a contract of some form and in the case of a dispute on the terms thereof there is no way that any court can without the benefit of oral evidence determine the issues.
- 5.3 The decision whether to dismiss an application on account of a dispute of fact foreseen or foreseeable by applicants is discretionary and can only be vitiated by injudicious exercise of such a discretion and not by preferences of the parties. No other court will, in my view, find fault with how that discretion was exercised in casu.

5.4 To order the alternative prayer of repayment would have involved arbitrarily deciding a genuine dispute of fact one way when the monies paid by the applicant were clearly at the heart of the dispute between the parties.

- [6] In my view, none of the grounds mentioned in the notice of application for leave to appeal and argued before me are remotely persuasive to tilt the scales in favour of the applicants when the section 17(1)(a) test alluded to *supra* and the Ramakatsa rationale are applied.
- [7] I understand the law as per section 17(1) (a)(ii) of the Act to be that beyond a finding that there are no reasonable prospects of success a court hearing a leave to appeal application must still enquire into whether there is any compelling reason why the appeal should be entertained and based on which leave may be granted. I am unable to find any compelling reason for leave to appeal to be granted.
- [8] In the unreported matter of ***Action Tinyiko Ngoveni and Another v Premier Limpopo Province and 6 Others (02/2022) Limpopo local Division, Thohoyandou [26 June 2024]*** this court made the following remarks which perhaps deserve repetition in casu:

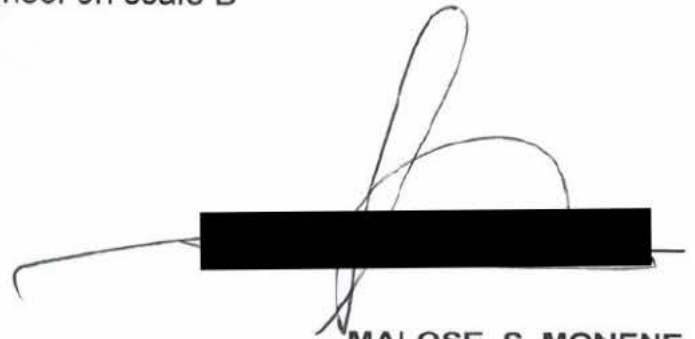
*"I momentarily pause, digress a bit and note that the court in **Ramakatsa**, while not per se answering the question of whether 'would' infers a more strenuous test than 'could', went on to itself employ the word 'could'. I venture to state here, albeit uninvited to go so far, that, it would in my view not be humanly possible nor permissible for a court seating as a court determining a leave to appeal application to make a finding on what a court of appeal **would do**. Such a finding would have some definitiveness which would not only be prejudging the consequent appeal and thus conflating the leave and appeal stages but would, if the appeal subsequently fails, disrespectfully suggest rather that the court granting the leave was in its injudicious soothsayer sighting of the future, some kind of false prophet. Courts are, as we are taught, steeped in the facts and law realm of this planet and have no jurisdiction in the prophetic spiritual other worldly. In my view therefore, despite the employ of the word "would" by the legislature in the Act, the actual rational intended meaning remains "could", which is not only a lesser attainable threshold but one judiciously and rationally permissible. Perhaps that is why the SCA in Ramakatsa did not pronounce with any definiteness on the debate at "high court level" on the could/would interpretation."*

[9] In all the above premises there are, in my view, no reasonable prospects that the applicant could let alone would succeed on appeal. The application should thus fail.

[10] The application for leave to appeal having been opposed successfully by the second and third respondents, there is no reason why the costs of this application should not, as is custom, follow the event.

[11] In the result, I make the following order:

11.1 The application for leave to appeal is dismissed with costs which costs shall include the costs of counsel on scale B



MALOSE. S. MONENE

**ACTING JUDGE OF THE HIGH COURT,
LIMPOPO DIVISION, POLOKWANE**

APPEARANCES

Heard on : 19 July 2024

Judgment delivered on : 03 October 2024

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