



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO

Case number: **18568/22**

17 September 2024

SIGNATURE

DATE

In the matter between:

JOHANNES HENDRICUS DU PLESSIS N.O

First applicant

(as joint liquidator of Double Ring 222 (Pty) Ltd)

QUINTON SIMON JOSEPH N.O

Second applicant

(as joint liquidator of Double Ring 222 (Pty) Ltd)

and

MINISTER OF FINANCE

First respondent

DEPARTMENT OF NATIONAL TREASURY

Second respondent

MOGAJANE, DONDO

Third respondent

(as the Director-General of National Treasury)

MINISTER OF HOME AFFAIRS

Fourth respondent

ORDER

The application for leave to appeal is refused with costs, including the costs of two counsel.

JUDGMENT

This judgment has been delivered by uploading it to the Court online digital data base of the Gauteng Division, Pretoria and by email to the attorneys of record of the parties. The date of the delivery of the judgment is deemed to be 17 September 2024.

Chabedi, AJ

Introduction

- [1] The applicants are joint liquidators in the insolvent estate of an entity named Double Ring 222 (Pty) Ltd ("Double Ring"). The only asset in the estate of Double Ring are the alleged claims against the fourth respondent (the Department of Home Affairs) in terms of a Service Level Agreement terminated in 2009.
- [2] The applicants sought a specific order directing the first, second and third respondents (the "National Treasury") to comply with the provisions of the Public Finance Management Act 1 of 1999 ("PFMA"), Supply Chain Management Instruction 5 of 2016 ("SCM Instruction 5") and National Treasury Circular issued on 26 March 2018 ("Treasury Circular"), by enforcing their directives to the Department of Home Affairs, to make payment to the applicants of the amount of \$2 095 238.09 together with interest thereon.
- [3] The court dismissed the application with costs. The applicants now seek leave to appeal the judgment and order of the court.
- [4] The applicants have raised two grounds of appeal. The first ground relates to the question whether there was a directive issued by National Treasury to the Department of Home Affairs to pay Double Ring the specified amount of money. The second ground relates to the question whether the National

Treasury had the duty in terms of the PFMA, the Treasury Instructions and Circular, to enforce the directive.

- [5] As regard the first question, the applicants argue that the court was wrong in not finding that the National Treasury's letter of 29 June 2010 addressed to the Department of Home Affairs constituted the directive.
- [6] The applicants contend that the court erred on the facts by finding that the undertaking by the Department of Home Affairs to pay Double Ring the amount of R15,84 million (\$2 095 238.09) in the letter of 18 April 2009 was conditional, and by finding that the amount agreed upon (by the Department and Double Ring) was not certain. The applicants also argued that the court was also wrong in finding that the claim was subject to a pending dispute between Double Ring and the Department of Home Affairs, because the amount claimed in this application represents the undisputed portion of the claim.
- [7] First, the court made no finding that the letter of 18 April 2009 constituted an undertaking by the Department of Home Affairs to pay Double Ring. That question was simply not before the court.¹
- [8] Second, the National Treasury's letter of 29 June 2010 recommends that the Director-General must seriously consider settling the dispute between the Department and Double Ring "*along the lines of the letter of 18 April 2009*". The Department's letter of 18 April 2009 states that the Department will pay all the amounts not in dispute into a nominated attorney's trust account upon compliance by Double Ring with certain pre-conditions set out in paragraphs 1 to 3 of the letter. The total of the said undisputed amounts is not mentioned in the letter. The applicants did not deal with these conditions at all.²
- [9] Therefore, on the facts, the letter of 18 April 2009 was conditional and did not specify the amount to be paid by the Department of Home Affairs to Double

¹ Judgment, para [61]

² Judgment, para [29]

Ring.³ The National Treasury's letter of 20 January 2009 to the Department of Home Affairs also did not mention any specific amount as having been confirmed as the undisputed amount owing to Double Ring.⁴ The letter only refers to the amount of R15,84 million, which Double Ring stated was for unpaid invoices during 2008.

- [10] The relief sought by the applicants was specific and direct. It did not refer to the letter of 29 June 2010, nor did it call for the interpretation of its content. The applicants moved from the premise that the directive as phrased in the relief exists, and it was for the court to compel the National Treasury to enforce it.⁵
- [11] Having had regard to the argument submitted on behalf of the applicants in this regard, I am not persuaded that there was a directive. The applicants' argument that the letter of 29 June 2010, read together with the letters of 18 April 2009 and 20 January 2009, must be interpreted to constitute a "directive" is confirmation that there was no directive. Accordingly, the court did not err on the facts as argued.
- [12] As to the second question, whether the National Treasury had the duty in terms of the PFMA, the Treasury Instructions and Circular, to enforce the directive, I point out that the applicants' application for leave to appeal has not pointed out any errors made in the judgment in this regard. The judgment found that the PFMA, the Treasury Instructions and Circular as specified in the relief sought, do not make provisions for the powers sought to be enforced by the applicants.
- [13] In the notice for leave to appeal the applicants accepted that section 6 of the PFMA does not prescribe the manner in which the National Treasury must enforce the PFMA.

³ *Ibid.*,

⁴ Judgment, para [30]

⁵ See Judgment paras [34] - [35]

- [14] It was however argued on behalf of the applicants that the courts have on numerous occasions found ways to fashion solutions to give effect to legislation and the Constitution and therefore that *“it is not unusual for Treasury to make payment on behalf of a department and the State Liability Act 14 of 2011 in sections 5, 11(e) and (f) empowers Treasury to in certain circumstances make payment on behalf of a department and then. Withhold voted funds to recover the payment.* This argument is new, was not part of the applicants’ case and does not relate to any part of the judgment. There is in any event no merit to this argument.
- [15] A party applying for leave to appeal must demonstrate that there are reasonable prospects of success and/or that there is some other compelling reasons why the appeal should be heard including conflicting judgments on the matter under consideration.⁶
- [16] In determining an application for leave to appeal under the Superior Courts Act, the court must then consider whether there is some measure of certainty that another court would differ from the judgment which is a subject of appeal and thus the prospect that the appeal would be successful.⁷ In the case of *Smith v S*, in considering what constituted reasonable prospect of success in section 17(1)(a)(i), the court stated that:

“What the test of reasonable prospect of success postulates is a dispassionate decision, based on the fact and the law that a court of appeal could reasonably arrive at a conclusion different to that of a 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 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 reasonable prospects of success.”⁸

⁶ Section 17(1)(a)(i) and (ii) of the Superior Court Act 10 of 2013

⁷ *Land and Agricultural Development Bank of South Africa and another v Van Den Berg and Others* [2022] 1 All SA 457 (FB) at para [16]

⁸ 2012 (1) SACR 576 (SCA) at para 7; see also *MEC for Health, Eastern Cape v Mkhitha M and Another* (2016) ZASCA 176 at para 17.

- [17] Based on the reasons discussed above and more fully on the findings made in the judgment, I am not convinced that the application for leave to appeal would have any reasonable prospects of success.
- [18] Counsel for the applicants in oral argument argued, with reference to the case in *Ramakatsa and Others v African National Congress and Another*,⁹ that even if the court finds on the facts that the appeal would not have any reasonable prospects of success, this case raises important issues of law whether, in light of section 6 of the PFMA and the Constitution, the National Treasury has the legal duty to issue directives to state organs and departments to pay service providers and the concomitant power to enforce such directives. Counsel argued on this basis that there are compelling reasons to grant leave to appeal.
- [19] I disagree. In *Ramakatsa* the court stated that even in those circumstances, the merits of a case remain vitally important and are often decisive.¹⁰ This application failed principally on the absence of a directive sought to be enforced. At a secondary, but equally important level, the application also failed on the absence of the laws on which the directive could be issued and enforced. Without the directive and the legal basis thereof, the question of law sought to be argued by the applicants would be a notional one and consequently, serve no purpose.
- [20] It is a well-established principle of our law that the court does not exercise its discretion in favour of deciding points that are merely abstract, academic or hypothetical ones. A court's discretion on the point of law must lie in the intrinsic character and object of the remedy.¹¹ I am therefore not persuaded that there are compelling reasons why the appeal should be heard.

⁹ [2021] ZASCA 31 (31 March 2021)

¹⁰ At para [10]

¹¹ *JT Publishing (Pty) Ltd and another v Minister of Safety and Security and others* 1997(3) SA 514 (CC) 524I - 525A-D at para [15],

Conclusion

[21] In conclusion, on the issue whether there was a directive and whether the National Treasury had the duty to enforce such directive, I find that there are no reasonable prospects of success. I also find that there are no compelling reasons on which to grant leave to appeal. I further find no cogent reasons why costs should not follow the course and why the costs of counsel where employed should not be recovered.

[22] In the premises, I make the following order:

The application for leave to appeal is refused with costs, including the costs for the employment of two counsel.

MPD Chabedi

Acting Judge of the High Court
Gauteng Division, Pretoria

APPEARANCES

For the applicants:

Adv XT Van Niekerk
Pistorius Scheepers Attorneys Inc

For the first, second and
third respondents:

Adv ZZ Matebese SC
Adv L Mthimkhulu (formerly Mgwetyana)
State Attorney, Pretoria

Date of hearing:

9 September 2024

Date of Judgment:

17 September 2024