

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case Number: **A2024-089753**

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
<u>12/09/2024</u>	
DATE	SIGNATURE

In the matter between:

BOY NO 50 TRADING (PTY) LIMITED

Appellant

and

BP SOUTHERN AFRICA (PTY) LIMITED

First Respondent

AQUERELLA INVESTMENTS 481 (PTY) LIMITED

Second Respondent

JUDGMENT

This judgment has been delivered by being uploaded to the CaseLines profile on and communicated to the parties by email.

Wepener J

[1] On 20 August 2024, Wilson J issued an order at the instance of the first respondent (BP Southern Africa (Pty) Limited ("BP") and the second respondent, Aquerella Investments 481 (Pty) Limited ("Aquerella") against the applicant, Boy No 50 Trading (Pty) Limited ("Boy 50") as follows:

2. That the Respondent be ordered to permit the designated representatives of the First Applicant unhindered access to the Property described as erven 49 and 50 Theta Extension 3 Township, Registration Division IQ, Province of Gauteng, measuring 2572 square metres in extent and held by Title Deed T37166/2008 ("the Premises") for the purposes of de-branding the petrol filling station situated at the Premises from all bpSA branding, signage and other material identifying the Premises as having any form of association with bpSA, within 1 Business Day of this Order; and
3. That the Respondent (and all persons occupying the Premises through the Respondent or in terms of any association with it) be ordered to vacate the Premises within 5 Business Days of this Order. . . ."

[2] On the same day, Boy 50 filed a notice of application for leave to appeal. This had the effect of suspending the order of Wilson J in terms of the Superior Courts Act. ("the Act")¹

[3] As a result, BP instituted an application in terms of section 18(3) of the Act on 21 August 2024, seeking the operation of the order granted on 20 August 2024 not to be suspended but to continue to be operational.

[4] On 23 August 2024 Wilson J heard both the application for leave to appeal and the section 18(3) application. On 26 August 2024, Wilson J dismissed the application for leave to appeal and ordered that the operation execution of the order not be

¹ Act 10 of 2013 section 18(1).

suspended and continue to be operational and executed irrespective of any pending appeals. On 26 August, 2024 Boy 50 delivered a notice of appeal in terms of section 18(4)(1)(ii) of the Act,² which again had the effect of suspending the order of Wilson J.³ The Deputy Judge President directed that the matter be set down before this Court, thus this hearing on an urgent basis.

[5] The facts of the matter were set out by Wilson J in his judgment,⁴ pursuant to the applications which were heard on 23 August 2024:

"The undisputed facts in the application were that BP had terminated an agreement under which it supplied fuel to be sold under its brand by Boy 50 at the petrol station. It did so in part because Boy 50 had begun selling fuel not sourced from BP while still using BP's branding. Aquarella had also terminated Boy 50's lease for non-payment of various amounts due under it. In addition, a test of the (non-BP) fuel sold at the petrol station on 15 May 2024 indicated that the fuel had been mixed with paraffin, had a dangerously low ignition temperature, and was, as a result, genuinely hazardous. There was no serious dispute before me that the operation of the petrol station in these circumstances is a disaster waiting to happen. The petrol station, or any of the cars that fill up at it, are at real and continuing risk of exploding if the hazardous fuel ignites at the wrong time."

[6] Boy 50 raised an issue that the court a quo should not have determined the section 18(3) application as there was no pending application for leave to appeal. This is clearly wrong. The court a quo heard and determined both applications⁵ before

² "18(4) If a court orders otherwise, as contemplated in subsection (1) –

(i) . . .

(ii) The aggrieved party has an automatic right of appeal to the next highest court. . . ."

³ Section 4(1)(iv).

⁴ Judgment by Wilson J para 2.

⁵ The section 18(3) application as well as the application for leave to appeal.

it, which in my view, it was entitled to do. In *Ntlemeza v Helen Suzman Foundation*⁶ Navsa JA said:⁷

"[29] . . . As pointed out on behalf of HSF and FUL, and following on what is set out in the preceding paragraph, s 18(1) does not say that the court's power to reverse the automatic suspension of a decision is dependent on that decision being subject to an application for leave to appeal or an appeal. It says that, unless the court orders otherwise, such a decision is automatically suspended.

[30] Moreover, contextually, the power granted to courts by s 18 must be seen against the general inherent power of courts to regulate their own process. This inherent jurisdiction is now enshrined in s 173 of the Constitution which provides:

'The Constitutional Court, the Supreme Court of Appeal and the High Court of South Africa each has the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice.'

[7] Thus, even if it can be said that the application for leave to execute was in anticipation of the application for leave to appeal, it was competent for the respondents to seek execution.

[8] In replying argument, the appellant abandoned reliance on this issue.

[9] Boy 50 also complains in heads of argument that it did not have written reasons from Wilson J when he granted the order in the urgent application. Although this was not referred to during argument, the following remarks are apposite.

[10] The appellant's reliance on the unreported matter of *Collins and Others v Minister of Police*⁸ is, in my view, misplaced. The learned Judge a quo did furnish his

⁶ 2017 (5) SA 402 (SCA).

⁷ At para 29 and 30.

⁸ High Court of South Africa, Pretoria – unreported judgment A290/2021 para 43: ". . . An appellant is entitled to proper reasons for a particular final order being made, and written reasons are indispensable to an appeal. The failure to give a properly reasoned judgment to underscore the order being made constitutes a grave lapse of duty of a presiding officer"

reasons in court in the presence of Boy 50's counsel whilst counsel made notes. Wilson J said:

"Mr Pule was clearly fully conversant with my reasons for making my order in the main application, and he must have known that there was no prospect of those reasons being supplemented all of them requiring the preparation of an expanded application for leave to appeal. Only the transcription of my ex tempore judgement was outstanding. That transcription is no more than a record of the reasons I had already given in court."

[11] In any event, Boy 50 now has the written reasons and advances no argument that, having received it in writing, there is anything that it would have said in the application for leave to appeal that was not contained herein. This underlines what Wilson J had mentioned that counsel knew full well what the reasons were when the learned judge gave his ex tempore judgement.

[12] Boy 50 raised two further grounds of appeal, i.e., the same two grounds that were argued before Wilson J being a prohibition to approach a court for urgent relief because of an agreement which obliged Boy 50 and Aquerella to arbitrate disputes, and the appellant's desire to introduce new evidence on appeal.

[13] The crux of the first issue was that the court can only be approached whilst arbitration proceedings were pending. The argument has no merit. The agreement entered into between the appellant and Aquerella provided:⁹

"Nothing herein contained shall be deemed to prevent or prohibit a party to the arbitration from applying to the appropriate court for urgent relief or for judgment in relation to a liquid claim."

[14] There is no limitation as to the time when a court may be approached. In my view, the court a quo correctly held as follows:

⁹ Point 12.6.

- “12. It was contended on Boy 50’s behalf that the right to approach the urgent court only accrues once a dispute on the contract has been referred to arbitration. In the absence of such a referral, the parties are not permitted to seek urgent relief. However, the clause must be interpreted ‘having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence’. The meaning ascribed to the clause must also avoid ‘insensible or unbusinesslike results’ which ‘undermin[e] the apparent purpose of the document (Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA), paragraph 18).
13. Adopting this approach, it seems to me that the lease cannot sensibly be read as preventing either party to the lease from seeking urgent relief unless and until a dispute is referred to arbitration. The lease plainly means that either party may approach a court for urgent relief or judgment on liquidated claim at any time, notwithstanding the fact that all other disputes under the lease should be referred to arbitration. I cannot foresee the reasonable possibility that an appeal court would construe the clause otherwise.”

[15] Wilson J exercised his discretion to hear the urgent application. This he was entitled to do. In *Foize Africa (Pty) Limited v Foize Beheer BV and Others* (“Foize”)¹⁰ the Supreme Court of Appeal (“SCA”) held that an arbitration clause does not exclude a court’s jurisdiction:¹¹

“[21] . . . It can now be regarded as well settled that a foreign jurisdiction or arbitration clause does not exclude the court’s jurisdiction. Parties to a contract cannot exclude the jurisdiction of a court by their own agreement, and where a party wishes to invoke the protection of a foreign jurisdiction or arbitration clause, it should do so by way of a

¹⁰ 2013 (3) SA 91 (SCA)

¹¹ Foize paras 21 and 22.

special or dilatory plea seeking a stay of the proceedings. That having been done, the court will then be called on to exercise its discretion whether or not to enforce the clause in question — see for example *Commissioner for Inland Revenue and Another v Isaacs NO and Others* 1960 (1) SA 126 (A) at 134B – H; *Yorigami Maritime Construction Co Ltd v Nissho-Iwai Co Ltd* 1977 (4) SA 682 (C); *Butler v Banimar Shipping Co SA* 1978 (4) SA 753 (SE); and *Universiteit van Stellenbosch v JA Louw (Edms) Bpk* 1983 (4) SA 321 (A) at 333G – H.

[22] The court a quo should therefore have approached the objection in limine on the basis that it enjoyed a discretion whether or not to enforce the clause, taking into account all the relevant facts and circumstances. In concluding that clause 10 excluded the jurisdiction of the high court to adjudicate upon the parties' dispute, it clearly misunderstood the position."

[16] The additional issue of new evidence is to be placed before this court was dealt with by Wilson J who said, correctly in my view, the following about the proposed new evidence:

- "14. The second ground of appeal, which rests on a prospective application to introduce new evidence faces two insurmountable obstacles. The first is that, in order to be introduced on appeal, new evidence must be 'practically conclusive . . . on the issue to which it is directed' (*O'Shea NO v Van Zyl NO* 2012 (1) SA 90 (SCA), paragraph 9.) The new evidence Boy 50 seeks to introduce on appeal cannot conceivably have that effect. The purpose of its introduction will be, at best, to create a dispute of fact about whether Boy 50 is still selling hazardous fuel. There is accordingly no prospect of the new evidence upon which Boy 50 seeks to rely being received on appeal.
15. Secondly, in any event, the new evidence Boy 50 tenders does not in fact show that the fuel Boy 50 sells is safe. The fuel test placed before me and sought to be relied upon on appeal relates, in its face, to diesel sold at the petrol

station on Kei Road in Bisho, in the Eastern Cape. There is no link between the test and Boy 50's petrol station, which is situated in Booyens, to the southwest of the Johannesburg inner city. Furthermore, the test results are not confirmed under oath by the person who performed the test. They are produced under cover of an affidavit from the person who asked for the fuel to be tested."

[17] There is no prospect that another court will find that a report concerning fuel sold at a different fuel station was relevant and result in a court overturning the existing order issued by Wilson J.

[18] The criteria were set out in *Rail Commuter Action Group and Others v Transnet Ltd t/a Metrorail and Others*.¹² These are:

"... Relevant criteria include the need for finality, the undesirability of permitting a litigant who has been remiss in bringing forth evidence to produce it late in the day, and the need to avoid prejudice. One of the most important criteria was the following: 'The evidence tendered must be weighty and material and presumably to be believed, and must be such that if adduced it would be practically conclusive. ...'"

[19] The appellant has failed to meet the criteria.

[20] As did Wilson J, I find any appeal that Boy 50 envisages, is hopeless and that the introduction of the proposed evidence must be refused.

[21] During argument, we were advised that the appellant no longer seeks relief against BP.

[22] Having come to this conclusion, the appeal falls to be dismissed with costs, which can be recovered in accordance with scale C of the Rules of Court.

¹² 2005 (2) SA 359 (CC)

[Redacted]

Wepener J

I agree.

[Redacted]

Senyatsi J

I agree.

[Signature]

Mahon AJ

Heard: 11 September 2024

Delivered: 12 September 2024

For the Appellant:

Adv K. Pule

Instructed by Betela Attorneys
Incorporated

For the First, Second Respondents:

Adv A. Milovanovic – Bitter

With Adv M. Salukazana

Instructed by ENS Africa