

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

Case No: 2024-023832

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

SIGNATURE

4 Oct 2024
DATE

In the matter between

AFRICAN NATIONAL CONGRESS

First Applicant

FIKILE APRIL MBALULA

Second Applicant

THAPELO MASILELA

Third Applicant

and

LEON AMOS SCHREIBER

Respondent

JUDGMENT (LEAVE TO APPEAL)

WANLESS J

Introduction

[1] In this application the Applicants, namely the African National Congress (*“the First Applicant”*); Fikile April Mbalula (*“the Second Applicant”*) and Thapelo Masilela (*“the Third Applicant”*), seek leave to appeal, either to the Supreme Court of Appeal (*“the SCA”*) or the Full Court of this Division, against the judgment and order of this Court granted (*on an urgent basis*) *ex tempore* on 3 April 2024 (*with the written judgment being delivered on the 6th of May 2024*). The application is opposed by the Respondent, namely one Leon Amos Schreiber (*“the Respondent”*).

[2] The Respondent’s urgent application before this Court was successful and the Applicants were found to be in civil contempt. This Court made an order in respect thereof, together with ancillary relief and an order whereby the First Applicant (*“the ANC”*) was to pay the costs of the urgent application on the scale of attorney and client, such to include the costs of two (2) Counsel.

[3] The principles of law to be applied in such an application in terms of section 17 of the *Superior Court Act 10 of 2013* (*“the Act”*) are trite. This brief judgment (*as necessitated by the very nature of the application itself*) will not be burdened unnecessarily by setting out same and referring to the authorities dealing therewith. Leave to appeal should *only* be granted if this Court is satisfied that an appeal court would (*not could*) come to a different finding than it did in its judgment and would grant a different order.

Grounds of appeal

[4] These grounds are set out in the Applicants' "*Amended Notice of Application for Leave to Appeal*". Once again, in order not to burden this judgment unnecessarily, those grounds will not be set out *verbatim* herein. To do so would serve little or no purpose. Rather, these grounds will be dealt with (*broadly*) when considering the Respondent's opposition thereto.

Discussion

[5] In respect of this Court's finding that the Applicants are in contempt of the order of Wepener J the Applicants submit that another court would come to a different decision in light of the failure of the Respondent to prove that, on a balance of probabilities, the Applicants acted wilfully and with *mala fides*. As correctly pointed out by the Respondent, this ignores the evidentiary burden which rests with the Applicants when the correct test for contempt is applied. Further, this proposition by the Applicants also ignores this Court's reasoning for the findings made in respect of contempt.

[6] With regard to the interpretation by this Court in respect of POPIA the Applicants do not deal, in this application, with the *actual* findings made by this Court. The grounds for leave to appeal generally simply repeat

the arguments already raised at the hearing of the urgent application. In the premises, the Applicants have failed to raise anything new flowing from this Court's judgment dealing with the prospects of success in this matter on appeal.

[7] With regard to the submission by the Applicants that this Court misdirected itself by finding that President Ramaphosa ought to have deposed to an affidavit, it is submitted by the Respondent (*correctly in the opinion of this Court*) that no such finding was made in the judgment of this Court.

[8] The Respondent submits (*in opposition to a further ground of appeal*) that the order made by this Court for the retrieval of deleted information is correct, both in fact and in law. Moreover, this ground, as relied upon by the Applicants, is contradicted by the Applicants' own version under oath. In addition, this Court's order seeks to give effect to the disclosures mandated by the order of Wepener J and based on common cause facts.

Conclusion

[9] Having carefully considered the submissions made by both the Applicants and the Respondent in this application for leave to appeal, it is the finding of this Court that the Applicants have failed to show that another court would come to a different decision and that the Applicants

should be granted leave to appeal. As set out in this brief judgment the Applicants have failed, *inter alia*, to raise any new grounds arising from this Court's judgment and order, which would give rise to this Court granting to the Applicants leave to appeal. In addition, as also dealt with herein, the submission on behalf of the Respondent that certain grounds upon which the Applicants have based this application are disconnected from the judgment and/or order of this Court, is a good one. Also, the Applicants have, in this application, been unable to substantiate, both in fact and/or law, reasons as to why this Court allegedly erred which would give rise to a court of appeal setting aside the judgment and order made by this Court. In the premises, this application by the Applicants for leave to appeal should be dismissed.

[10] The foregoing is applicable not only insofar as the application for leave to appeal is based upon subsections 17(1)(a)(i) and (ii) of the Act but also in terms of subsection 17(1)(c) thereof.

[11] This Court should also add that in making such an order, it further bears in mind the oft repeated narrative of the courts of appeal that the court *a quo* should be slow to grant applications for leave to appeal in matters where the prospects of success are not good. This avoids the unnecessary burdening of the rolls of the appeal courts.

Costs

[12] As to the issue of costs, there are no unusual circumstances pertaining to this matter that would cause this Court, in the exercise of its general discretion pertaining thereto, to deviate from the trite principle that costs should normally follow the result. In the premises, the Applicants should be ordered to pay the costs of the application for leave to appeal. As to which applicant should pay those costs or whether the three applicants should pay the costs, jointly and severally the one paying the others to be absolved, it is noted that, in the contempt application, this Court ordered that the costs be paid by the ANC only. It must be accepted that this was the order sought by the Applicant in the contempt application. This is so, since no cross-appeal has been noted by the Respondent and no application for leave to cross-appeal against that costs order has been placed before this Court by the Respondent. In the premises, it will be accepted that, in the present application, the Respondent, once again, seeks an order for costs against the First Applicant (*the ANC*) only.

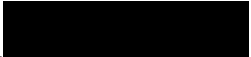
[13] Regarding the scale of those costs, Counsel for the Respondent submitted that a similar order for costs, as was made by this Court in respect of the contempt application, should follow in the present application. In other words, it was submitted that the costs of this application should be paid on the scale of attorney and client, as was ordered in the contempt application. In its previous judgment, this Court

dealt fairly extensively with the reasons why, in its discretion, it elected to make the award in respect of costs in the contempt application on the higher scale, such to include the costs of two (2) Counsel. This present judgment will not be burdened unnecessarily by repeating those reasons. Suffice it to say, this Court finds that those reasons are, to a large degree, equally applicable to the present application. Arising therefrom and in the exercise of this Court's general discretion in respect of the issue of costs, it is the opinion of this Court that the First Applicant should, once again, pay the costs of this application for leave to appeal, on a punitive scale, such to include the costs of two (2) Counsel.

Order

[14] This Court makes the following order:

1. The application for leave to appeal against the judgment and order of this Court under case number 2024-023832, granted (*on an urgent basis*) *ex tempore* on 3 April 2024 (*with the written judgment being delivered on the 6th of May 2024*), is dismissed.
2. The First Applicant (*the African National Congress*) in the application for leave to appeal is to pay the costs of this application on the scale of attorney and client, such to include the costs of two (2) Counsel.


B. C. WANLESS
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION
JOHANNESBURG

Date of Hearing: 3 June 2024

Date of Judgment: 4 October 2024

Appearances

On behalf of the Applicants: Adv. S. Sikhwari SC
Adv. M. V. Botomane

Instructed by: Mamathuntsha Attorneys

On behalf of the Respondent: Adv. N. Ferreira SC
Adv. A. Raw

Instructed by: Minde Shapiro & Shaw Inc.