

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

CASE NO: 116568/24

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

8 November 2024
DATE


SIGNATURE

In the matter between

EMMANUEL MAKALELA MASHILE

Applicant

and

DANIEL EXCLUSIVE FASHION (PTY) LTD

Respondent

J U D G M E N T

WANLESS J

Introduction

- [1] In this application, opposed by Daniel J Exclusive Fashion (Pty) Ltd (*“the Respondent”*), Emmanuel Makalela Mashile (*“the Applicant”*) seeks a declaratory order that, *inter alia*, the judgment and order of Joseph AJ of 28 July 2023, be declared to be “...invalid, unlawful and unconstitutional, in terms of, among other relevant Rules of the court, Rule, 6(5)(d)(ii) of the Uniform Rules of this Court.”
- [2] It was always the intention of this Court to deliver a written judgment in this matter. In light of, *inter alia*, the onerous workload under which this Court has been placed, this has simply not been possible without incurring further delays in the handing down thereof. In the premises, this judgment is being delivered *ex tempore*. Once transcribed, it will be “converted”, or more correctly “transformed”, into a written judgment and provided to the parties. In this manner, neither the quality of the judgment nor the time in which the judgment is delivered, will be compromised. This Court is indebted to the transcription services of this Division who generally provide transcripts of judgments emanating from this court within a short period of time following the delivery thereof on an *ex tempore* basis.

Discussion

- [3] The facts which are common cause and cannot be seriously disputed by either of the parties, are as set out below in the following “*discussion*”.
- [4] The Applicant was unsuccessful in a trial instituted by him against the Respondent. Dissatisfied with the outcome of the trial, he sought leave to appeal the judgment and order. Leave to appeal was refused on 28 July 2023 by Joseph AJ who had presided at the trial.
- [5] Whilst the Applicant was represented at the trial, he was unrepresented when he applied for leave to appeal. On the basis that the Respondent did not file a notice of intention to oppose the application for leave to appeal (*which may or may not be correct but which will be accepted in the Applicant’s favour*) the Applicant submits that his application for leave to appeal was unopposed and ought to have proceeded on an unopposed basis. Based thereon the Applicant enrolled that application for leave to appeal for hearing on the unopposed motion roll of this Court. It is trite that this was the incorrect procedure for the Applicant to follow. The Applicant was obliged to follow the provisions of Rule 49. In this regard the provisions of subrules 49(d) and (e) are particularly relevant for the purposes of this application. These subrules are peremptory and read as follows:

“(d) The application mentioned in paragraph (b) above shall be set down on a date arranged by the registrar who shall give written notice thereof to the parties.

.....

(e) Such application shall be heard by the judge who presided at the trial or, if he is not available, by another judge of the division of which the said judge, when he so presided, was a member.”

- [6] Subrule (e) is “*entrenched*” in statute. Subsection 17(2)(a) of the Superior Courts Act 10 of 2013 provides that:

“Leave to appeal may be granted by the judge or judges against whose decision an appeal is to be made or, if not readily available, any other judge or judges of the same court or Division.”

- [7] In the premises, the submissions on behalf of the Respondent that (a) whether opposed or unopposed the matter had to serve before the trial Judge (Joseph AJ) for hearing and (b) the Respondent was entitled to oppose the application for leave to appeal without the filing of a notice of intention to oppose, are good and are accepted by this court. See *Silver Birch Estate Homeowners Association NPR (RF) and Others v Heyneke and Others* [2022] ZAGPJHC 773 at paragraph [22].

- [8] The Respondent's attorneys attempted to rectify the enrolment of the matter on the unopposed role and to ensure that the application served before the trial judge for hearing. The Applicant submits this is an impermissible interference by the Respondent in respect of court allocations. He further submits that the Respondent's attorneys were attempting to deceive him and acted unethically.
- [9] As clearly set out herein, Joseph AJ heard the application for leave to appeal and dismissed it. Before dismissing it the learned acting Judge explained to the Applicant that applications for leave to appeal are heard by the trial Judge. The Applicant submits that this explanation and the fact that Joseph AJ entertained the Respondent's opposition to the application for leave to appeal (absent a notice of opposition) was bias on the part of Joseph AJ and indicative of an improper relationship between Joseph AJ and the Respondent or its attorneys.
- [10] The Applicant's case is based on the fact that, being ostensibly unopposed, the Respondent ought not to have been heard at all and that the matter ought to have proceeded before the Judge presiding in the unopposed motion court (and not Joseph AJ). He also submits that his application for leave to appeal ought to have been granted. The Applicant further contends that he was prejudiced by the Respondent's failure to notify him of its intention to oppose his application.

- [11] The Applicant, as set out earlier in this judgment, has instituted this application for declaratory relief being an order that the order refusing leave to appeal is invalid, unlawful and unconstitutional and falls to be set aside.

Conclusion

- [12] Before this court it was submitted, on behalf of the Respondent, that the application should be dismissed, with costs. This is in light of the fact that the present application is based upon the Applicant's erroneous understanding of the correct procedure to be followed in respect of applications for leave to appeal. In this regard, it was further submitted that:

- 12.1 it has been a long-standing practice in this Court that a notice opposing a leave to appeal application is not necessary;
- 12.2 even if formal notice of opposition was necessary, failure to file a notice of opposition does not preclude a party from defending proceedings. It is the practice of our courts that a notice of opposition may be entered at any time prior to judgment;
- 12.3 even if the matter had proceeded on an unopposed basis, it would not have been heard by the Judge presiding in unopposed motion court.

- [13] All of the foregoing are valid submissions and are accepted by this Court. In addition thereto, whether the application for leave to appeal was opposed or unopposed (*and there may well be a dispute of fact in this regard since the*

Respondent alleges a notice of opposition was filed), has no bearing whatsoever on the decision taken by the learned acting Judge, Joseph AJ, to dismiss the Applicant's application for leave to appeal. It is the judgment and order of Joseph AJ that the Applicant wishes to be declared to be "... *invalid, unlawful and unconstitutional*".

[14] The foregoing relief is sought in terms of the Uniform Rules of Court, with particular reliance being placed on subrule 6(5)(d)(ii). This subrule deals with the delivery of an answering affidavit within fifteen (15) days after notifying an applicant of intention to oppose an application. In light of that as stated above, this subrule is of no assistance, at all, to the Applicant in the present application.

[15] In addition, even if the Applicant was correct in his reliance upon the aforesaid subrule the present application and the relief sought is not in accordance with the correct procedure. This is because, simply put, there is no such procedure to institute an application in the present form (*in terms of the Superior Courts Act: the Uniform Rules of Court or the Practice Directives of this Division*) and to seek the relief sought by the Applicant in this matter. The only relief available to the Applicant, following the dismissal by Joseph AJ of the Applicant's application for leave to appeal, was to follow the provisions of subsection 16(1)(b) of the Superior Courts Act and petition the Supreme Court of Appeal for leave to appeal to that court.

[16] In light of the foregoing, this application falls to be dismissed.

Costs

[17] There are no circumstances in this matter, of which this Court is aware, to cause this Court to deviate from the trite principle that costs should normally follow the result.

[18] In the premises and in the exercise of this Court's general discretion in respect of costs, this Court finds that it would be just and equitable if the Applicant paid the costs of this application.

Order

[19] This court makes the following order:

1. The application is dismissed.
2. The Applicant is to pay the costs of the application under case number 2023/116568.



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

Appearances

For the Applicant: Mr Mashile (In Person)

For the Respondent: Adv. K. D. Iles
Instructed by: Wever Wentzel

Date of Hearing: 29 April 2024
Ex Tempore Judgment and order: 29 October 2024
Written Judgment: 8 November 2024