

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

CASE NUMBER : 3212/2019

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE	NO
(2) OF INTEREST TO OTHER JUDGES	NO
(3) REVISED	
<u>17/10/2024</u>	
DATE	SIGNATURE

In the matter between:

GENESIS ONE LIGHTING (PTY) LTD

Applicant

and

JAMIESON, BRADLEY LLOYD N.O.

1st Respondent

RODNEY GERSON FITTINGHOFF N.O.

2nd Respondent

BRAD ANTHONY KALISH N.O.

3rd Respondent

ROBERT LARRY KALISH N.O.

4th Respondent

JASON RIVKIND N.O.

5th Respondent

IRON ICE (PTY) LTD

6th Respondent

STEAMLIGHT FX (PTY) LTD

7th Respondent

J U D G M E N T
(APPLICATION FOR LEAVE TO APPEAL)

VAN DER BERG AJ

[1] This is an application for leave to appeal against the whole of my judgment and order handed down on 7 August 2024.

[2] The application is governed by section 17(1) of the Superior Courts Act 10 of 2013.¹ The Supreme Court of Appeal has explained the test as follows:²

“If a reasonable prospect of success is established, 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

¹ Section 17(1)(a) reads:

(1) 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 judgments on the matter under consideration,

² *Ramakatsa v African National Congress* [2021] ZASCA 31 at para 10:

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

- [3] This judgment should be read with the 7 August 2024 judgment (“*the judgment*” or “*the main judgment*”).

THE CONTEMPT APPLICATION

Contempt beyond failure to supply documents

- [4] The applicant raises as a ground for leave appeal that I erred in failing to consider that the contempt extended beyond just a failure to supply documents. Extensive argument was presented on the various aspects in which the respondents allegedly breached the interim order granted by Mahalelo J.

- [5] However, the applicant’s case was expressly limited to an order relating to the respondents’ contempt for the non-delivery of documents and an order for their delivery.⁴ The applicant did not in its notice of application for leave to appeal or heads of argument in the application for leave to appeal present argument on what basis the other alleged instances of contempt can be determined by a court of appeal.

³ See also: *S v Smith* 2012 (1) 567 SACR at para 7

⁴ Judgment, para’s 17-19

Acting on legal advice

- [6] The applicant states that it was a misdirection in accepting the respondents' claim that they relied on advice from their erstwhile attorneys in respect of the delivery of documents. It is further averred there was an error "*in fact and/or law*" by failing to apply the principles set out in the SCA case of *Ndabeni*.⁵
- [7] *Ndabeni* was overruled by the Constitutional Court⁶ where the Court specifically accepted the parties' claim in that matter that they were acting on legal advice. The case of *Holder v Rex* 1930 NPD 63 (relied on by the applicant in the application for leave to appeal) is therefore not authority for the proposition that reliance on legal advice can never be a defence to a charge of contempt of court. In any event, that case dealt with a statutory contravention and not with civil contempt of court.
- [8] The applicant also contends that the respondents' consistent delays and non-compliance are relevant factors in assessing whether the respondents acted wilfully and mala fides in their non-compliance of the order. The alleged delays and the non-compliance were taken into account in the main judgment.
- [9] It was also (for the first time) contended in the notice of application for leave

⁵ *Ndabeni v Municipal Manager: OR Tambo District Municipality* [2021] ZASCA 8; JDR 0066 (SCA)

⁶ *Municipal Manager, or Tambo Municipality and Another v Ndabeni* 2023 (4) SA 421 (CC)

to appeal that the respondents' version on this issue was "far-fetched and clearly untenable", and that the Plascon-Evans rule was misapplied. The respondents' version is supported by the objective facts and the time-line and cannot be held to be far-fetched or untenable: The respondents' new attorneys came on record in October 2022, and on 24 November 2022 the respondents filed a supplementary discovery affidavit containing 4140 documents. Additional documents were provided by the respondents on 23 February 2023. The respondents have purged any contempt or breach that may have existed⁷ (a finding that was not seriously challenged in the application for leave to appeal).

Sanction

[10] The notice of application for leave to appeal contains the following ground:

"35 The learned judge erred in law by failing to find and sanction the respondents' contempt, even though he was not prepared to declare the respondents in contempt/breach, but incorrectly reasoning that the notice only sought a declaration and coercive order rather than a sanction..."

35.3 The learned judge had a duty to consider sanctions for contempt sua sponte (i.e. of one's own accord) regardless of the specific relief sought in the notice of motion, given the clear evidence of non-compliance with a court order".

[11] In contempt of court proceedings there is a distinction between coercive and

⁷ Judgment, para's 30-32.

punitive orders. A coercive order gives a respondent the opportunity to avoid imprisonment by complying with the original order and desisting from the offensive conduct. Such an order is made primarily to ensure the effectiveness of the original order by bringing about compliance. The characteristics of a punitive order are *inter alia*: a sentence of imprisonment cannot be avoided by any action on the part of the respondent to comply with the original order; the sentence is unsuspended; the order is influenced by the need to assert the authority and dignity of the court to set an example for others.⁸

[12] Private parties can act as so-called “*informers*” by bringing contempt of court to the attention of a court without seeking coercive or remedial relief.⁹

[13] The applicant relies in the application for leave to appeal on *State Capture Commission* and *Lan v OR Tambo*.¹⁰ In *State Capture Commission* the applicant approached the court to seek a punitive order. In *Lan v OR Tambo* the contempt had already been purged at the time when the application for contempt was brought. The applicant therefore also sought a punitive order. The court held:

“[76]...I come to the conclusion that, once a party to any proceedings has shown that there was at any given time non-compliance with a court order, that was wilful and mala fide, I a finding of contempt of

⁸ *Secretary State Capture Commission v Zuma* 2021 (5) SA 327 (CC), para 47

⁹ *State Capture Commission* (*supra*), para 184

¹⁰ *Lan v OR Tambo International Airport Department of Home Affairs Immigration Admissions and Another* 2011 (3) SA 641 (GNP)

court can be made. Obviously, later compliance with a court order will have a substantial effect on the penalty flowing from such a finding. It should, however, not preclude the granting of such an order, should it be requested.

[77] In this matter an order was requested and asked for, that Mr Mogale, Mr Kgoale and Mr MacKay be found guilty of contempt of court." (Own emphasis)

[14] In this application the applicant did not come as an informer and did not seek a punitive order. It sought a coercive order. *State Capture Commission* and *Lan v OR Tambo* do not avail the applicant.¹¹ The courts did not *mero moto* impose punitive sanctions in those cases.

[15] The applicant cannot now in an application for leave to appeal attempt to become an informer to promote the public interest.

COUNTER-APPLICATION: VARIATION OF INTERIM ORDER

[16] The applicant in its notice of application for leave to appeal avers that I erred in not considering whether any of the confidential information at issue in this case falls within the category of trade secrets (or their equivalent) which would warrant an interdict until trial. Counsel during argument postulated the hypothetical example that the applicant may prove at trial that the applicant invented a secret formula which has been unlawfully used by the respondents. The answer to this is if the applicant is in fact in possession of

¹¹ See also *JR v AL* (21609/2021) [2021] ZAGPJHC 590 (28 October 2021) where the applicant amended its notice of motion to include a punitive order.

a secret formula or other trade secrets, it should have said so in its answering affidavit in the counter-application.

[17] The applicant contends that “*the learned judge erred in law by failing to recognize that the purpose of the interim interdict pending the finalization of the action was to provide fair protection to the applicant’s rights for the period for which the unfair advantage may reasonably be expected to continue...*”

[18] However, the applicant did not provide the court with any facts regarding how long the respondents’ “*unfair advantage may reasonably be expected to continue.*”

[19] The respondents in support of their counter-application furnished detail as to why the interim interdict should be varied.¹² The applicant has not countered these averments.

CONCLUSION AND ORDER

[20] I have considered all the grounds in the extensive application for leave to appeal. Most of the grounds have been dealt with in the main judgment. There is no reasonable prospect that a court of appeal could arrive at a different conclusion in respect of the application in convention or the counter-application.

[21] The application for leave to appeal is dismissed with costs, such costs to

¹² Set out in para 50 of the judgment

include the costs of two counsel to be taxed on scale C in terms of rule 67A
read with rule 69.



VAN DER BERG AJ

APPEARANCES

For the applicant:

Adv CB Garvey
Instructed by:
Otto Krause Inc

First respondent: No appearance

For the second to seventh respondents:

Adv I Miltz SC with
Adv J M Hoffman
Instructed by:
Hadar Inc

Date of hearing: 10 October 2024

Date of judgment: 17 October 2024