

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NO: 2023/ 013774

(1)	REPORTABLE: <i>no</i>
(2)	OF INTEREST TO OTHER JUDGES: <i>no</i>
(3)	REVISED:
<i>11/11/2024</i>	
DATE	SIGNATURE

In the matter between:

SA RETAIL PROPERTIES (PTY) LIMITED

Plaintiff

and

BLACK PANTHER LOUNGE (PTY) LIMITED

First Defendant

HENRI EL HAGE

Second Defendant

This judgment was handed down electronically by circulation to the parties' representatives via e-mail, by being uploaded to CaseLines/Court online and by release to SAFLII. The date and time for hand- down is deemed to be 10h00 on 1 November 2024.

Order: Para [11] of this judgment

JUDGMENT: APPLICATION FOR LEAVE TO APPEAL

TODD, AJ:

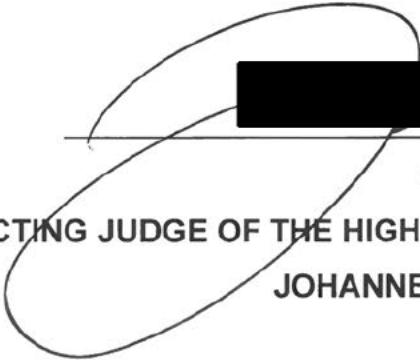
- [1] This is an application for leave to appeal against the judgment that I handed down on 24 June 2024. The application is brought by the First and Second Defendants, and I will continue to refer to the parties as in the original pleadings.
- [2] There were various delays in hearing this application which were attributable primarily to the fact that the Defendants' legal representatives (Applicants in the application for leave to appeal) were not available on the date on which the application was initially enrolled. It was ultimately heard on 31 October 2024.
- [3] On the test to be applied in deciding whether to grant leave to appeal, I follow the approach set out by the Supreme Court of Appeal in *Ramakatsa and others v African National Congress*¹.
- [4] Mr Mawere, who appeared for the Defendants applying for leave to appeal, focused his submissions on the proposition that there are conflicting judgments on the question whether an irregular pleading can simply be ignored, or whether it must necessarily be dealt with as an irregular step under the provisions of Rule 30 of this Court's Rules. In support of his submission that there are conflicting authorities on the approach that must be taken, he referred to the judgment of Pickering J in the unreported decision in *Sulaiman Ahmed Olgar v Minister of Safety and Security and others* in the Eastern Cape Division of the High Court in Grahamstown (Case No 586/2012). He referred me to a number of other decisions, too, in which he submitted the High Court had adopted a different approach to that which I adopted in my judgment in this matter. The main thrust of his submission was that there are conflicting judgments and that I erred in the approach that I adopted and followed a line of authority that is incorrect.

¹ [2021] ZA SCA 31 at paragraph [10]

- [5] Mr Mawere accepted, however, that on the facts of the present matter what had occurred was that the Defendants were barred from pleading. They had served an application to uplift the bar but had not filed that application. Mr Mawere accepted that the application could only be said to have been “delivered” in terms of the court rules once it had been both served and filed. He submitted that in circumstances where an interlocutory application of this kind had been served but not filed this constituted an irregular step which could only be dealt with by recourse to the provisions of Rule 30.
- [6] Mr Mawere further submitted that it was evident from the fact that the matter had previously been postponed *sine die*, by order made on 18 January 2024, that the application to uplift the bar had been “before court” on that date (even though the application had not been filed) and that a step had therefore been taken which could not be ignored and which could only be dealt with under the provisions of Rule 30. In this regard Mr Mawere submitted that it was the failure by the Defendants to file the application which constituted the irregular step, and that this failure to file the application could only be dealt with by applying to set it aside.
- [7] Mr Amojee, who appeared for the Plaintiff (Respondent in the application for leave to appeal) submitted that the authorities relied on by Mr Mawere were distinguishable, that the situation was different where a pleading had not in fact been filed (and therefore had not been delivered within the meaning of the rules) and that the Court was properly entitled to disregard the application to uplift the bar, which had not in fact been before it.
- [8] I have carefully considered the submissions of Mr Mawere and am satisfied that the Defendants (Applicants in the application for leave to appeal) do not have a reasonable prospect of success on appeal. Since the Defendants had failed to deliver their application to uplift the bar over an extended period, the factual position was indeed materially different from that in the cases relied upon by Mr Mawere in which a pleading of one kind or another had been delivered late. There are in fact no conflicting authorities (or at least none that I was referred to) on the proposition that a pleading is not delivered until it has been filed at court. That being so, when the matter came before me no application had been

brought to uplift the bar. There is not, in my view, a reasonable prospect that another Court would find in the Defendants' favour. As a result, the application for leave to appeal should fail.

- [9] With regards to costs, Mr Amojee submitted that punitive costs should be granted in the application for leave to appeal. He referred to the prolixity of the application for leave to appeal, which set out a large number of grounds on which the application was founded. He also referred me to paragraph [22] of the underlying judgment, in which I found it to be clear that the strategy being adopted by the Defendants was dilatory and amounted to an abuse of the processes of the Court.
- [10] In my view I should determine the costs in the application for leave to appeal on the basis of what has occurred in this application. It is so that the application is unnecessarily lengthy and contains a large number of largely repetitive submissions dressed up as separate grounds of appeal. On the other hand, in advancing his submissions when the matter was heard Mr Mawere confined himself to dealing with respects in which the Defendants could reasonably seek leave. Although I have concluded that they do not have reasonable prospects of success, it does not seem to me that there are grounds for a punitive costs order in this application. The unnecessary length and prolixity of the notice of application for leave to appeal is to be deprecated, but this is something that may properly result in additional preparation time and consequently increased fees being allowed by the taxing master when determining the amount of costs to be allowed in the application for leave to appeal.
- [11] For those reasons I make the following order: the application for leave to appeal is dismissed with costs.



C TODD
ACTING JUDGE OF THE HIGH COURT
JOHANNESBURG

Date of Hearing: 31 October 2024

Date of Judgment: 1 November 2024

APPEARANCES

Counsel for the Plaintiff: M Amojee

Instructed by: Hadar Incorporated

Counsel for the First and Second Defendants: M Mawere

Instructed by: Carl van Zyl Attorneys and
Onah Attorneys Inc