

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MAKHANDA)**

NOT REPORTABLE

CASE NO.2696/2023

In the matter between:

**CATERPILLAR FINANCIAL SERVICES SOUTH AFRICA
PROPRIETARY LIMITED**

Applicant

and

AMLO TRADING CLOSE CORPORATION

Respondent

JUDGMENT (Application for Leave to Appeal)

WATT AJ:

[1] This is an opposed application for leave to appeal in which the Respondent seeks leave to appeal my judgment in which I ordered that the Respondent return four Caterpillar units ("the Units") to the Applicant. The main application was a *rei vindicatio*, based on the Applicants ownership of the Units in terms of a written sale agreement and two schedules thereto ("the Agreement"). In my judgment I found that

the Agreement had been validly cancelled by the Applicant and that the Respondent had not proved a legal basis upon which it could remain in possession of the Units.

[2] For convenience I shall refer to the parties as they were in the main application.

[3] Section 17 of the Superior Courts Act 10 of 2013 provides that leave to appeal may “*only be given*” if the appeal “*would*” have a reasonable prospect of success, or there is some other compelling reason why the appeal should be heard.

[4] The prior Act¹ employed the word “*could*” instead of “*would*” in relation to the test in an application for leave to appeal and did not contain the word “*only*”. The test is now more onerous than it previously was, but what remains consistent is that it is still required that there be reasonable prospect of success and there must be a rational basis to conclude that there exists a reasonable prospect of success on appeal.²

[5] “*An applicant for leave to appeal must convince the court on proper grounds that there is a reasonable prospect or realistic chance of success on appeal. A mere possibility of success, an arguable case or one that is not hopeless, is not enough. There must be a sound, rational basis to conclude that there is a reasonable prospect of success on appeal*”.³

[6] The application for leave to appeal consists of five paragraphs which contain the grounds of appeal, two paragraphs of which refer to attached documentation

¹ Supreme Court Act 59 of 1959

² *Valley of the Kings Thaba Motswere (Pty) Ltd and Another v Al Mayya International* (EL926/2016, 2226/2016) [2016] ZAECHGHC 137 (10 November 2016) at paragraph 4

³ *MEC for Health, Eastern Cape v Mkhitha* 2016 JDR 2214 (SCA) at paragraph 7

consisting of nineteen pages, which documentation was not before me at the hearing of the main application. There is no affidavit identifying and explaining the attached documentation. Mr Louw, who appeared on behalf of the Applicant, submitted that the application for leave to appeal is fatally defective as it does not comply with Rule 49(1)(b) because the grounds of appeal are not clearly and succinctly set out in clear and unambiguous terms so as to enable the court, and the Applicant, to be fully informed of the case the Respondent seeks to make out. Although it is improper for nineteen pages of documentation to simply have been attached to the application for leave to appeal, which documentation I deal with later on in this judgment, I am able to discern the main thrust of the grounds of appeal and accordingly do not dismiss the application on this ground.

[7] There are essentially three grounds of appeal advanced by the Respondent. Firstly, that I erred in not finding that there was agreement between the parties, notwithstanding the terms of the Agreement, that lump sum payments made by the Respondent to the Applicant was an acceptable form of payment. Secondly, that I erred in finding that the Agreement had terminated by the effluxion of time. Thirdly, the Applicant issued a letter confirming that one of the Units had been fully paid for and the Respondent had made payment of the full sum owed to the Applicant. I deal with these three grounds, in turn, below.

[8] I dealt with the Respondent's defence that there was agreement between the parties, that the Respondent would make lump sum payments to the Applicant, in paragraph 27 of my judgment. I found that this defence was not supported by the correspondence which had been exchanged between the parties, considered

together with the payments made by the Respondent, and found further that the Applicant had validly cancelled the Agreement. I also found that payments made by the Respondent to the Applicant, after the cancellation of the Agreement, could not defeat the validity of the cancellation.⁴ Mr Giwu, who appeared on behalf of the Respondent, urged that the Applicants conduct, by accepting payments after the cancellation, evidenced that there was such an agreement. The Applicants conduct, reflected in the correspondence, to which I referred in paragraph 6 of my judgment, does not evidence such agreement. Mr Giwu was unable to refer me to any case law in support of his submission that the Applicants conduct in accepting payments after cancellation, in circumstances in which the Applicant specifically stated that such acceptance should not be construed as a waiver of its rights, revived the cancelled Agreement. I am not persuaded that this ground has reasonable prospects of success on appeal.

[9] In paragraph 29 of my judgment I stated that *"I also add, as advanced by Mr Louw in argument, that the time period of 36 months contained in the respective schedules to the instalment sale agreement, has lapsed and accordingly the Agreement has terminated by effluxion of time"*. I rejected the Respondent's defence of the alleged agreement relating to lump sum payments and, similarly, this defence could not be sustained against the fact that the Agreement had lapsed though the effluxion of time. Even if I had not made this finding, the result would have been the same. I am also not persuaded that this ground has reasonable prospects of success on appeal.

⁴ *Moodley v Reddy* 1985 (1) SA 76 (D) at 82F and *Boland Bank Ltd v Pienaar and another* 1988 (3) 618 (A) at 621G-623B

[10] I heard the main application on 28 March 2024 and judgment was delivered on 25 June 2024. The application for leave to appeal states that I erred by not considering that one of the Units *"has been fully paid-off as per the letter the Respondents sent to the Appellant on the 03rd of June 2024 annexed herein as "Annexure AT1".* Annexure "AT1" is a letter from the Applicant to the Respondent, dated 3 June 2024, and headed *"Paid up Letter"*. This letter states that the total balance in terms of the Agreement, relating to one of the Units, has been settled. The application for leave to appeal further states that the Respondent received a statement from the Applicant, ending on 3 February 2024, which reflects a balance of R878,121.84 and attaches the statement as "AT2". Annexure "AT2" is a fourteen page document reflecting five columns, including debits and credits. It is not apparent that "AT2" emanates from the Applicant and is simply a spreadsheet. Proof of payments are also attached to the application for leave to appeal, as "AT3", "AT4" and "AT5", which reflect payments to the Applicant by the Respondent in the sum of R500,000.00 on 30 March 2024; R300,000.00 on 29 April 2024 and R78,182.00 on 24 June 2024 respectively.

[11] I did not have the documentation referred to in the preceding paragraph, which is simply attached to the application for leave to appeal with no affidavit, before me when I heard the main application, nor prior to my judgment being handed down. It is documentation primarily referring to events which occurred after the hearing of the main application.

[12] *"As they now seek to build a case on a foundation not previously laid, they should be precluded from doing so. Although it may be open to a party to raise a*

point of law which involves no unfairness to the other party and raises new factual issues, a point raised for the first time on appeal on factual considerations not fully explored in a court below, should not be allowed."⁵ Not only were the new documents, attached to the application for leave to appeal, not explored in the main application, they did not form part of the application papers which were before me. The main application was decided on the facts that were present at the time, and as were apparent from the application papers. The adjudication of a matter is done on the evidence which was before the court at the time, events which occurred subsequent to the hearing of the matter cannot sustain the basis of an application for leave to appeal.

[13] There is, in any event, no application before me, supported by an affidavit, for the Respondent to adduce the documentation as evidence on appeal. In fact the documentation attached to the application for leave to appeal cannot be considered evidence at all because the documents are not dealt with by way of an affidavit. Mr Giwu urged me to condone the lack of an affidavit, which I am of the view I cannot do.

[14] Despite these glaring difficulties relating to the documentation attached to the application for leave to appeal, which are fatal to the application succeeding based thereon, I will in any event deal with the documentation which is sought to be relied upon by the Respondent.

[15] It is incumbent on an applicant for leave to adduce further evidence to satisfy the court that the further evidence should be accepted and further evidence will only

⁵ *Ras and Others NNO v Van Der Meulen and Another* 2011 (4) SA 17 (SCA) at paragraph 16

be allowed where special grounds exist.⁶ The further evidence tendered must be weighty and material, and presumably to be believed, and must, if adduced, be conclusive, otherwise the matter would still lack finality.⁷

[16] The test whether to allow further evidence to be adduced was formulated in *S v De Jager*⁸ and is that (a) there should be a reasonably sufficient explanation why the evidence was not led when the matter was heard; (b) there should be a *prima facie* likelihood of the truth of the evidence and (c) the evidence should be materially relevant to the outcome of the matter.

[17] The reason why the documentation was not adduced in evidence when the main application was heard is because they did not exist at the time of the hearing. Annexures "AT1", "AT3", "AT4" and "AT5" to the application for leave to appeal were all generated, and are dated, subsequent to the hearing of the main application. I assume that "AT2" is the document referred to in the application for a postponement, which I quoted at paragraph 10 of my judgment. I refused the application for a postponement and it appears that the Respondent again wishes to place a document before me, which I had previously refused. I engaged with Mr Giwu at the hearing of the application for leave to appeal as to whether the Respondent should not have sought to appeal against my dismissal of the application for a postponement. He indicated that the Respondent accepted my decision regarding the postponement application. Evidence of events which occurred subsequent to the hearing of the

⁶ *De Aguiar v Real People Housing (Pty) Ltd* 2011 (1) SA 16 (SCA) at paragraph 11 and *Simpson v Selfmed Medical Scheme and Another* 1995 (3) SA 816 (A) at 825A-D

⁷ *Colman v Dunbar* 1933 AD 141 at 162

⁸ 1965 (2) SA 612 (A) at 613B

main application cannot be admissible.

[18] I cannot determine whether the documentation attached to the application for leave to appeal is even *prima facie* correct or accurate as it is not dealt with by way of an affidavit, particularly in relation to annexure "AT2", of which I cannot determine the source nor accuracy thereof.

[19] As to whether the documentation is material, I think not. The alleged payments reflected in "AT3", "AT4" and "AT5" were made subsequent to the cancellation of the Agreement and I found in my judgment that subsequent payments made by the Respondent, after the cancellation, cannot defeat the validity of the cancellation.

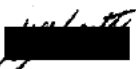
[20] I am accordingly not persuaded, based on the documentation attached to the application for leave to appeal, that there are reasonable prospects of success on appeal.

[21] There is no sound nor rational basis for me to conclude that there is a reasonable prospect of success on appeal and I therefore intend refusing the application. There is no reason why costs should not follow the result. The Agreement makes provision for costs on an attorney and client scale and there is no reason to interfere with this agreement between the parties.⁹

[22] In the circumstances the following order is made:

The application for leave to appeal is dismissed, with costs on an attorney and client scale.

⁹ *Geldenhuys v East and West Investments (Pty) Ltd* 2005 (2) SA 74 (SCA) at paragraph 7


KL WATT
ACTING JUDGE OF THE HIGH COURT

APPEARANCES

For the Applicant:

Mr PG Louw, instructed by Netteltons
Attorneys, Makhanda.

For the Respondent:

Mr N Giwu, instructed by Nceba Giwu Inc.,
Mthatha.

Date heard:

26 July 2024.

Date delivered:

30 July 2024.