

REPUBLIC OF SOUTH AFRICA



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

CASE NO: 079773/2023

(1)	REPORTABLE: YES /NO
(2)	OF INTEREST TO OTHER JUDGES: YES /NO
(3)	REVISED: YES /NO
.....	...02/12/2024.....
SIGNATURE	DATE

In the matter between:

BRETT THOMAS LANG

Applicant

and

ABSA BANK

First Respondent

NEDBANK

Second Respondent

STANDARD BANK

Third Respondent

INVESTEC BANK

Fourth Respondent

WESBANK

Fifth Respondent

JAN VAN DER WALT (CRS)

Sixth Respondent

ROBERT DEVEREUX (CRS)

Seventh Respondent

ADVOCATE NIGEL RILEY**Eighth Respondent****FINANCIAL SERVICE'S CONDUCT AUTHORITY****Ninth Respondent**

LEAVE TO APPEAL JUDGMENT

MANOIM J:

- [1] This is an application for leave to appeal a judgment I delivered on 11 September 2024 dismissing the applicant's application for a declaratory relief on the grounds of lack of locus standi.
- [2] The applicant, Bret Lang, whom I shall refer to by name, as I did in my September decision, seeks leave to appeal on three grounds. I will deal with each of them successively. The first deals specifically with what he contends are errors in my findings that he lacked *locus standi*:
- a. He states that I erred in "...separating the individual persona of the Applicant from his persona as a representative bringing an Application in the public interest." But he says the error was that "*The Applicant also presents himself to the court as a party whose legal status resultant the conduct complained of in the Main Application, contributed to his eventual sequestration and affected his status upon his sequestration thereby disqualifying him from being a Director of a company until rehabilitated;*
- b. He goes on to state that: "*The Applicant has an adequate interest in the matter based on his affected status, allegedly caused by some or all of the Respondents acting together, resulting in a change of his status from a solvent to an insolvent;*"

c. Then he states: *“The Court erred in respect of the above in failing to accommodate the overlapping representative capacity of the Applicant bringing the matter in terms of Section 38 of the Constitution, both in his individual capacity, and in the public interest;*

[3] But Lang does not say why these are errors or whether there is any legal authority that contradicts those that I relied on. What I did in the decision was to go through the various claims for locus standi that Lang relied on and to explain why they did not afford him standing. His complaint is that I considered each ground separately. But apart from asserting this approach is an error he does not explain why. On the contrary looking at each claim for standing discretely was to his advantage. But if he is suggesting that these grounds should have been looked at cumulatively – meaning that they bolster one another - then that is a proposition that is novel and for which he has not offered any authority.

[4] To the extent that he seeks to rely on being an insolvent and that the application would have led to him becoming solvent again that is also a mistaken appreciation of his own case. Even if he had succeeded this was not the relief sought in the main application and hence not one competent for me to have made. A separate directed application would be required for this and nothing in the decision prevents him from still doing so.

[5] A new argument he makes and one which was not made in the main application is that the bank respondents (i.e., the first to fifth respondents) are “public interest entities” and hence should be susceptible to a greater level of scrutiny

because their actions effect the public at large. For this he relied on the Independent Regulatory Board of Auditors' (IRBA) proposed code dated 2016, which has a definition of what constitutes a 'public interest entity" and includes in the definition banks as they are defined the Banks Act.

[6] But this argument was never raised in the main application nor is it mentioned in the Leave to appeal. But it does not appear that the document which is dated March 2016 and styled as an amendment is in force currently. But if it is, as one of the respondents pointed out, it was not extant at the times the events complained of had occurred which date back to 2010 and earlier. Nor was the Financial Sector Regulation Act 9 of 2017, a copy of which he attaches to his heads of argument.

[7] This is an attempt to hoist up his case for standing into the public interest realm, because banks are now considered to be public interest entities. But on the facts the case he has put up concerns his relationship qua client with the banks. This relationship has always been regarded as a private interest matter.

[8] There is no authority to support this public interest approach to the banking sector by a client vis a vis its banker. Indeed, as pointed out by counsel for Nedbank there is authority to the contrary.

[9] In *Oakbay* the question was whether the Minister of Finance could intervene in a dispute between a client and its banker to get a declaratory order. The court

held that the dispute remained a private matter regardless of the implications it held for the Oakbay Group the banks or the South African economy.¹

[10] The second ground of appeal relates to the fact that I described the relief sought as abstract and hypothetical in nature. But argues Lang since he has direct experience of what happened to him the relief is not hypothetical or abstract. But his personal experience does not change the effect of the relief he seeks. At its clearest the relief seeks an order declaring that the banks have in some part of the history of the interactions with Lang, contravened some legislation and the common law. Such relief if granted would then be taken to the NPA or the Competition Commission to tell them to investigate further. But they are not bound by any factual finding I make because even if they were to go to court on the strength of a possible finding I make as Van Zyl DJP observed “*factual findings of one court do not bind another*.”²

[11] Nor are they bound to prosecute either. But most relevant of all they are not precluded from investigating his complaints without a prior declaratory order. He also persists in wanting a declaration that the behaviour of the banks at least was contra bonos mores or contrary to public policy. It is not the job of courts to make declaratory orders about issues of morality or public policy. That is the sense I meant when I held the relief is abstract and hypothetical.

[12] The third ground of appeal is:

¹ See *Minister of Finance v Oakbay Investments (Pty) Ltd and Others* 2018 (3) SA paragraph 69.

² *VN v Member of the Executive Council for Health and Social Development of the Eastern Cape* 2022 JDR 1691 (ECP) at para [20].

“The applicant seeks a declaration by this Court that the conduct of the First to Fifth Respondents [here he means the bank respondents] at least, constitutes conduct that is either illegal in terms of statute, common law, contra bonos mores, contrary to public policy and / or such conduct was not in the public interest;”

[13] But this ground of appeal is indistinguishable from the second. If anything, it highlights the abstract and impractical nature of the relief sought.

[14] All the respondents who opposed the leave to appeal make the point that the Lang’s notice of appeal fails to meet the requirements of section 17 (1)(a) of the Superior Courts Act. As one of the counsel put it, he went no further than making the point that he disagreed with the decision, and he repeated arguments made before me when I heard the application to dismiss. But an applicant for leave needs to do more than this. As was held by the Supreme Court of Appeal in *Ramakatsa*:

“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 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 (Emphasis provided)

[15] That test has not been met in this case. It also appears that Lang is under the mistaken belief that he cannot pursue his complaints with the NPA or the Competition Commission because he has lost his *locus standi* to do so. In the penultimate paragraph of his heads of argument he says the following:

“If this current Judgement is left to stand, and leave to appeal not granted, it would further take away my locus standi to report the matter to the NPA and Competitions Tribunal (sic), and the matter would simply die and no justice will be served which would not be in the Public and or Creditors interest, as who else would or could do anything about this matter and the matter buried.”

[16] But as I explained to Mr Lang at the hearing this is a mistake of law on his part. The dismissal of his application does not deprive him of his right to report matters he considers illegal or unlawful to any authority, be it the police, the NPA or the Competition Commission.

Conclusion

[17] The leave to appeal although not stating so expressly was confined to the case against the five bank respondents. The three other respondents were not

³ *Ramakatsa and Others v African National Congress and Another* (724/2019) [2021] ZASCA 31 (31 March 2021 paragraph 8).

mentioned in the Notice. Two of them did not appear and I assume this is the reason. The eighth respondent was represented by his attorney and although he did not file heads of argument, his attorney indicated that he associated himself with the submissions made by counsel for the bank respondents.

[18] The application for leave to appeal does not demonstrate that Lang would have a reasonable prospect of success.⁴ The appeal must be dismissed.

ORDER:-

[19] In the result the following order is made:

1. The application for leave to appeal is dismissed.
2. The applicant is liable for the costs of the application to those respondents opposing it, on a party and party scale including the costs of counsel on Scale C, and those of senior counsel where used.


N. MANOIM
JUDGE OF THE HIGH COURT
GAUTENG DIVISION
JOHANNESBURG

Date of hearing: 28 November 2024

Date of Judgment: 02 December 2024

⁴ *MEC for Health, Eastern Cape v Mkhitha* 2016 JOL 36940 (SCA) at paragraph 16.

Appearances:

For the Applicant:

B T Lang

Instructed by:

In Person

Counsel for the First Respondent:

N J Horn SC

Instructed by:

Tim Du Toit & Co Inc

Counsel for the Second Respondent:

G D Wickins SC

L Acker

Instructed by:

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N Konstantinides SC

Instructed by:

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Counsel for the Eighth Respondent:

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