

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION PRETORIA

CASE NO: 115832/23

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED: YES/NO
19-03-2025	
DATE	SIGNATURE

In matter between

MTECH CONSTRUCTIONS (PTY)LTD

Applicant

and

GOOSEN MEGA ENTERPRISE (PTY)LTD

Respondent

REGISTRATION NUMBER: 2018/100674/07

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the parties/their legal representatives by e-mail and by uploading it to the electronic file of this matter on Caselines. The date for hand-down is deemed to be 19 March 2025

JUDGEMENT IN THE APPLICATION FOR LEAVE TO APPEAL

LESUFI AJ

Introduction

- [1] This is an application for leave to appeal against the cost order of the judgment I granted on the 24 January 2025. The leave to appeal is brought in terms of

Rule 49 of the Uniform Rules read with section 17 of the Superior Act. The application is opposed by the Respondent.

- [2] The parties will be referred as the Applicant and the Respondent. The Applicant was the Respondent in the main application.

Background facts

- [3] The facts pertinent to this appeal are based on the dispute that arose between the Applicant and the Respondent, regarding an unpaid amount of money relating to a construction project. The initial contract was worth R 2,704,235.65, and R 2,627,969.84 has already been paid without any issues. However according to the Respondent there was an amount still due. Upon the Applicant's failure to pay the amount due, the Respondent, the Respondent issued a Notice in terms of section 345 with the intention to liquidate as per their letter dated 28th September 2023.
- [4] The Respondent claimed the Applicant owes R 76,265.81, but the Applicant disputed this amount and said the correct amount is R 75,686.56. The Applicant offered to pay the disputed amount into their attorney's trust account pending the outcome of the litigation, but the Respondent didn't accept this offer.
- [5] The main issue was a disagreement over R 579.25, which stems from the quantity of building materials used during the construction project. This issue was never referred to a construction expert for resolution.

Applicant's grounds of Appeal

- [6] The Applicant contents that the court erred in making no order as to costs in the following circumstances:
- 6.1 It is trite that the general rule is that costs follow the result.
- 6.2 that the Respondents initiated the liquidation application on an urgent basis whereas the application was not urgent.

- 6.3 the Applicant had at all times contended that the correct amount was R75 ,686.56 and not R76,265.81 as claimed by the Respondent.
- 6.4 As early as 28 September 2023 the Applicant's Representative had requested an invoice from the Respondent in the correct amount.
- 6.5 the Applicant only requested the invoice only to correct the amount.
- 6.6 the Respondent declined to do so and initiated liquidation application.
- 6.7 the Respondent's papers contain scurrilous and unfounded accusations of fraud against the Director of the Applicant and the and Applicant itself.
- 6.9 On the 12 December 2023 the Applicant again tendered payment of R 75,686.56 against production of a corrected invoice, pointed out that the difference between amount claimed by the Respondent said was due amounted to R 579.25 and offered (with prejudice) that both parties paid their own costs upon withdrawal of the liquidation application. This offer was never accepted.
- 6.10 On the 24 April 2024 Applicant confirmed that its attorneys held R75, 686.56in Trust and again offered (with prejudice0 that if an invoice fir R75, 686.56 was issued then payment would be made and that both parties would pay own costs. Therefore, the court a quo misdirected itself.

Respondent's opposition to the Application for leave to appeal

[7] The application for leave to appeal is vehemently and vigorously opposed the application. The basis for opposing being that it is clear that there was no misdirection by the court a *quo*. The Respondent is of the view that there is no misdirection on the following grounds:

7. 1 Even though it is common in law that cost follow the result, the court a *quo* clearly stated in the judgement the reasoning why the court diverted from the norm.
- 7.2 The court a *quo* exercised its discretion as far as costs are concerned.
- 7.3 The amount to date is still outstanding despite a demand for payment being made by the Respondent to the Applicant.

7.4 The Respondent resorted to the liquidations proceedings out of frustration.

7.5 That most of the issues raised were ventilated in the motion proceedings and were dealt with.

7.6 The amount owed is still kept by the Applicant in the Trust account.

7.7 It was further submitted that the matter was never brought to court on an urgent basis as alleged.

7.8 The court *a quo* balanced the scales of justice by not awarding costs.

Issues for determination

[8] Whether this appeal has prospects of success.

Applicable principles/tests to the adjudication of an application for leave to appeal and analysis of the ground of appeal

[9] Rule 49 of the Uniform Rules of Court dictates the form and process of an application for leave to appeal and the substantive law pertaining thereto is to be found in section 17 of the Superior Courts Act 10 of 2013. The latter Act raised the threshold for the granting of leave to appeal, so that leave may now only be granted if there is a reasonable prospect that the appeal will succeed. The possibility of another court holding a different view no longer forms part of the test. There must be a sound, rational basis for the conclusion that there are prospects of success on appeal. The interpretation of the Rules and the Law has evolved in case law since 2013. In numerous cases, the view is held that the threshold for the granting of leave to appeal was raised with the inauguration of the 2013 legislation (Superior Courts Act 10 of 2013). The former assessment that authorization for appeal should be granted if “*there is a reasonable prospect that another court might come to a different conclusion*” is no longer applicable.

[9] The words in section 17(1) that: “Leave to appeal may only be given...” and section 17(1)(a)(i) that: “The appeal would have a reasonable prospect of success” are peremptory. “If there is a reasonable prospect of success” is now that: “May only be given if there would be a reasonable prospect of success.” A possibility and discretion were therefore, in the words of the legislation and

consciously so, amended to a mandatory obligatory requirement that leave may not be granted if there is no reasonable prospect that the appeal will succeed. It must be a reasonable prospect of success; not that another Court may hold another view.

[10] The court *a quo* may not allow for one party to be unnecessarily put through the trauma and costs and delay of an appeal. In *Four Wheel Drive v Rattan N.O.*¹ the following was ruled by Schippers JA (Lewis JA, Zondi JA, Molemela JA and Mokgohloa AJA concurring):

“[34] There is a further principle that the court *a quo* seems to have overlooked — leave to appeal should be granted only when there is 'a sound, rational basis for the conclusion that there are prospects of success on appeal'. In the light of its findings that the Plaintiff failed to prove locus standi or the conclusion of the agreement, I do not think that there was a reasonable prospect of an appeal to this court succeeding that there was a compelling reason to hear an appeal. In the result, the parties were put through the inconvenience and expense of an appeal without any merit.”²

Application

[11] It is indeed so that costs follow the successful party however this norm is not binding on courts as costs are discretionary. I am alive to the fact that if I have to exercise my discretion, I have to do so judiciously.

[12] The basic rule of costs overrides the general rule that costs should follow suit. This is aptly explained in *Graphic Laminates CC v Albar Distributors CC*,³ the court held that:

“It is trite that liability for costs in civil proceedings is a separate issue that is governed by its own criteria. The fundamental principle is that liability for costs is in the discretion of the court that is called upon to adjudicate the merits of the issues between the parties (See: *Kruger Bros & Wasserman v Ruskin* 1918 AD 63 at 69) on the basis of the facts and circumstances of each individual case (See: *Cronje v Pelser* 1967(2) SA 589 (A) at 593). In the absence of express statutory provisions to the contrary, the general rule that

¹ 2019 (3) SA 451 (SCA).

² *Id* at para 34.

³ 2005 (5) SA 409 (C).

costs follow the result is subservient to that fundamental principle (See eg: *Unimark Distribution (Pty) Ltd v Erf 94 Silvertondale (Pty) Ltd* 2003(1) SA 204 (T) at 215 E – F). It appears to me to be axiomatic that, if the question of costs has been fully ventilated, and a court does not say anything about liability for costs or specifically states that there will be no order as to costs, each party is liable for the payment of its own costs (See: G.B. van Zyl: *The Judicial Practice of South Africa* (Volume II) 894).⁴

[13] This position was confirmed in *Ferreira v Levin*.⁵ in a judgment on costs given separately from the judgment on the merits, the Court pointed out that the courts have over the years, developed a flexible approach to costs which proceeds from two basic principles, the first being that the award of costs, unless otherwise enacted, is in the discretion of the presiding judicial officer, and the second that the successful party should, as a general principle, have his or her costs.

[14] In *Fighters v Speaker of the National Assembly*⁶ the discretion was described as follows:

“Further, an analysis of some of the decided authorities in dealing with proceedings of this nature demonstrates that the more prevalent approach is that the successful party is entitled to its costs, with the court always retaining the discretion to make an order that seems just and equitable, considering the position of the party against whom any such costs order is levied. At the end of the day, several factors must be considered when a cost award is issued in such circumstances.”

[15] Based on the authority above, the instances in which leave to appeal is granted against costs orders only are rare.⁷

[16] The threshold that the Applicant faces does not end here. Section 16(2)(a) of the Act requires that “exceptional circumstances” must be established for the Applicant to succeed in an application for leave to appeal on the issue of costs.

⁴Id at para 11.

⁵ [1995] ZACC 2; 1996 (4) BCLR 441 (CC); 1996 (2) SA 621 (CC).

⁶ [2024] ZAWCHC 160

⁷ *Tebeila Institute of Leadership, Education, Governance and Training v Limpopo College of Nursing and Another* 2015 (4) BCLR 396 (CC) at para 13.

There are no exceptional circumstances that were raised by the Applicant in this matter.

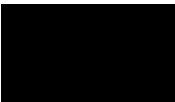
[17] Lastly, I extensively considered the Heads of Arguments by the Applicant and reply by the Respondent, I am of the view that both parties are at fault considering the circumstances of this case. The Respondent instituted liquidation proceedings without any merit. The applicant also prompted the Respondent to institute the liquidation proceedings. The Applicant had an opportunity to at the very least pay the undisputed amount.

[18] I am of the view that the application for leave to appeal does not carry any weight as I exercised my discretion judiciously.

[19] I therefor make the following order:

19.1 The application for leave to appeal is dismissed.

19.2 The Applicant to pay costs on party and party scale

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B LESUFI

**ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA**

APPEARANCES:

For the Applicant:	Adv Mark Meyerowitz
Instructed by:	Mr Greg Harrison of Harrisons Inc

For the Respondent:	Advocate W Venter
Instructed by:	Uys Inc

Date of Hearing	14 March 2025
Date of Judgment	19 March 2025

