

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
HELD AT PRETORIA**

**CASE NO: 2020/26468
DOH:18 FEBRUARY 2025**

- 1) REPORTABLE: NO
- 2) OF INTEREST TO OTHER JUDGES: NO
- 3) REVISED.

[Redacted Signature]

SIGNATURE

26 MARCH 2025
DATE

In the matter between:

**VANTAGE MEZZANINE FUND II
PARTNERSHIP**

First Applicant / Plaintiff

**VANTAGE MEZZANINE FUND II (PTY)
LTD**

Second Applicant / Plaintiff

and

UNEMPLOYMENT INSURANCE FUND

First Respondent/Defendant

**MINISTER OF EMPLOYMENT AND
LABOUR**

Second Respondent/Defendant

**DIRECTOR GENERAL FOR THE
DEPARTMENT OF EMPLOYMENT AND
LABOUR**

Third Respondent/Defendant

SOMNIPOINT (PTY) LTD (In Liquidation)

Fourth respondent / First-third
Party

MURRAY CLOETE, N.O.

Second Respondent /Second -
third Party

MAHLANGU KHATHAZILE SIMON, N.O.

Third Respondent / Third-third
Party

This judgment has been handed down remotely and shall be circulated to the parties by way of email / uploading on Caselines. The date of hand down shall be deemed to be 26 March 2025.

ORDER

1. The application for leave to appeal is dismissed.
2. The defendants are ordered to pay the plaintiffs' costs on scale C, such costs to include the costs of two counsel.

JUDGMENT

BAM J

Introduction

1. This is an opposed application for leave to appeal the judgment and order of this court of 23 December 2024. That order struck out the defendants' defence in the underlying action. The defendants contend in their notice of application for leave to appeal that this court erred in various respects. They suggest that they have prospects of success and another court would come to a different finding. Notably, the defendants do not contend that there are any compelling reasons as to why leave to appeal should be granted.

2. The thrust of the plaintiffs' opposition is that, having considered the circumstances of this case, this court, in reaching its decision, exercised a discretion. They submit that the instances in which an appellate court will interfere with a lower court's exercise of its discretion are limited. Citing, *inter alia*, *Giddey NO v JC Barnard and Partners*, they submit that an appellate court will not consider 'whether the decision reached by the court of first instance was correct,

'but will only interfere in limited circumstances; for example, if it is shown that the discretion has not been exercised judicially or has been exercised based on a wrong appreciation of the facts or wrong principles of law. Even where the discretion is not a discretion in the strict sense, there may still be considerations which would result in an appellate court only interfering in the exercise of such a discretion in the limited circumstances mentioned above.'¹

3. The plaintiffs add, given that the defendants do not assert that this court did not exercise its discretion judiciously and/or that the discretion was based on

¹ (CCT65/05) [2006] ZACC 13; 2007 (5) SA 525 (CC); 2007 (2) BCLR 125 (CC) (1 September 2006), paragraph 19.

a wrong appreciation of the facts or wrong principle of law, the application should be dismissed for lack of merit.

4. I begin by setting out the law governing applications for leave to appeal followed by the law dealing with the principle of appellate restraint. I thereafter consider the defendants' grounds of appeal by following the different themes in their notice of application for leave to appeal.

Leave to appeal: Applicable legal principles

5. Applications for leave to appeal are governed by section 17 of the Superior Courts Act². The relevant parts of the provision read:

'17. Leave to appeal

(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;'

6. In *Ramakatsa and Others v African National Congress and Another*, the threshold for granting leave to appeal was articulated thus:

'Turning the focus to the relevant provisions of the Superior Courts Act (the SC Act), leave to appeal may only be granted where the judges concerned are of the opinion that the appeal would have a reasonable prospect of success or there are compelling reasons which exist why the appeal should be heard such as the

² Act 10 of 2013.

interests of justice. This Court in *Caratco*, concerning the provisions of s 17(1)(a)(ii) of the SC Act pointed out that if the court is unpersuaded that there are prospects of success, it must still enquire into whether there is a compelling reason to entertain the appeal.³

7. The Supreme Court of Appeal has frowned at the regularity with which leave to appeal is granted to that court. In *Mothuloe Incorporated Attorneys v Law Society of the Northern Province and Another*, it said:

'The test is simply whether there are any reasonable prospects of success in an appeal. It is not whether a litigant has an arguable case or a mere possibility of success...This court has in the past bemoaned the regularity with which leave is granted to this court in respect of matters not deserving its attention. This is one case where leave to appeal should have been refused for lack of reasonable prospects of success.'⁴

8. Turning now to the legal principles governing appellate restraint. In *Minister of International Relations and Co-operation and Others v Simeka Group (Pty) Ltd and Others*, it was said:

'[89] [T]he power of an appellate court to interfere with the exercise of such a discretion [discretions in the strict sense] is circumscribed. The ambit of this power was described by the Constitutional Court in *Biowatch Trust v Registrar Genetic Resources and Others* thus:

'the ordinary rule is that the approach of an appellate court to an appeal against the exercise of a discretion by another court will depend upon the nature of the discretion concerned. Thus where the discretion contemplates that the Court may choose from a range of options, the discretion would be a discretion in the strict sense ...

"[T]he ordinary approach on appeal to the exercise of a discretion in the strict sense is that the appellate court will not consider whether the decision reached by the court at first instance was correct, but will only interfere in limited

³ (724/2019) [2021] ZASCA 31 (31 March 2021), paragraph 10.

⁴ (213/16) [2017] ZASCA 17 (22 March 2017), paragraph 18.

circumstances; for example, if it is shown that the discretion has not been exercised judicially or has been exercised based on a wrong appreciation of the facts or wrong principles of law. Even where the discretion is not a discretion in the strict sense, there may still be considerations which would result in an appellate court only interfering in the exercise of such a discretion in the limited circumstances mentioned above. The rationale for this principle is, as Cloete J aptly observed, that a narrow discretion 'requires in essence the exercise of a value judgment and there may well be a legitimate difference of opinion as to the appropriate conclusion'...'⁵

9. Distinguishing between a discretion in the strict and loose sense, the Constitutional Court in *Trencon Construction (Pty) Limited v Industrial Development Corporation of South Africa Limited and Another*, noted:

'[85] A discretion in the true sense is found where the lower court has a wide range of equally permissible options available to it. This type of discretion has been found by this Court in many instances, including matters of costs, damages and in the award of a remedy in terms of section 35 of the Restitution of Land Rights Act. It is "true" in that the lower court has an election of which option it will apply and any option can never be said to be wrong as each is entirely permissible.

[86] In contrast, where a court has a discretion in the loose sense, it does not necessarily have a choice between equally permissible options. Instead, as described in *Knox*, a discretion in the loose sense—

“means no more than that the court is entitled to have regard to a number of disparate and incommensurable features in coming to a decision.

...

[88] ...An appellate court ought to be slow to substitute its own decision solely because it does not agree with the permissible option chosen by the lower court.’⁶

⁵ (610/2021) [2023] ZASCA, paragraphs 89; *The Special Investigating Unit v Phomella Property Investments (Pty) Ltd and Another* (Case no 1329/2021) [2023] ZASCA 45, (3 April 2023), paragraph 11.

⁶ [2015] ZACC 22.

Defendants' grounds

(i) The court erred in finding that the defendants failed to comply with the Rule 35(3) notice and thus the court order

10. The defendants submit that upon reading their first supplementary discovery affidavit, (supplementary affidavit) it is clear that they complied with the plaintiff's rule 35(3) notice; that a reading of paragraphs 2, 3, 4 and 5 of their supplementary affidavit together with their notice in terms of Rule 35(6) demonstrates compliance with the notice and the court order; and, contrary to the finding of this court in paragraph 44 of its judgment, the 210 documents listed in the First Schedule of their supplementary affidavit fall within the class of documents specifically set out in paragraphs 1, 2, 3, 4 and 5 of the plaintiff's notice.

11. It is patently clear that the defendants' supplementary affidavit avoids addressing the various classes of documents sought in the notice. The judgment addresses the points raised by the defendants in this regard, along with the reasons for its conclusion. No point will be served by repeating the judgment. The contentions are without merit and there is no prospect that another court would come to a different finding.

(ii) The court erred in finding that the defendants had disregarded the rules of court and intentionally defied the court order.

12. The contention here is that if the defendants were incorrect in their assertion that they had complied with the notice and thus the court order, that is in and of itself an error of law which does not equate to wilful disregard for the court.

The conclusion whether the defendants had either failed or succeeded in complying with their discovery obligations is an issue steeped in fact. Those facts are dealt with in the judgment. The contention lacks merit.

(iii) *The court erred in failing to place sufficient weight on the defence raised in terms of section 217 of the Constitution.* (iv) *The court erred in finding that the principle in Gefen and Another v De Wet and Another is only applicable to eviction matters.*

13. I address these two points in turn. In the first instance, the defendants submit that the court should have accepted that the pleadings could still be amended. On this basis, the court was not confined to the pleadings as they stood. The claim made by the defendants in this regard is that there is no evidence before the court that the lease between Somni and the UIF was concluded following a competitive bidding process as mandated by Section 217 of the Constitution. Should this defence be struck out, it would result in significant loss to the fiscus in the form of irregular, fruitless and wasteful expenditure.

14. The judgment addresses this point, adequately, I submit, and distinguishes the circumstances of this case from those of *Gobela* and *Kunene Rampala*. Simply, there was and still is no defence regarding the speculation regarding non-compliance with Section 217 of the Constitution. Likewise, the court distinguishes in its judgment the responsibility entrusted with courts when entertaining matters pertaining to the PIE Act, as set out in *Gefen and Another v De Wet and Another*, as opposed to what I would call, non-PIE matters, such as the application brought by the plaintiffs. It serves no purpose to regurgitate

the reasoning of the court in this regard. There is no merit to these grounds and no prospect that another court would come to a different finding.

(v) The court erred in its reckoning of the various time periods when considering the defendants' delays

15. The defendants deny that they took 19 months to pursue their third-party proceedings, claiming that the correct period was about 7 months. They further deny that it took them 7 months to file their answering papers in the application to strike out asserting that the delay was 7 weeks. There is a lot more involved in this court's reasoning of the defendants' delay and the manner they had conducted themselves before this court. That conduct includes common cause facts and propagating falsehoods. There is simply no merit to this ground and no prospect that another court will come to a different finding.

(vi) The court failed to place sufficient weight on the UIFs section 34 rights and placed undue reliance on an incorrect finding that the UIF disrespected the fundamentals of the litigation system

16. The defendants submit that the UIF had demonstrated why it asserts it has complied with its discovery obligations. In the event it was wrong, that is as result of an error of law which is not sufficient to deprive the UIF of its right to a fair trial. I have already dealt with the fallacy pertaining to the error of law elsewhere in this judgment. Rule 35(7) makes provision for the dismissal of a party's claim or the striking out of its defence in the event of failure to comply with the rule. This is the very basis of the order issued by this court on 2

February 2022. There was and still is no specific challenge to the rule nor to the order on the basis of unconstitutionality. In any event, the defendants were afforded a fair public hearing, with all the defendants represented by Senior and Junior counsel, both of whom stand in the position of custodians of the UIF's section 34 rights. And, as set out in the Constitutional Court case of *Lane and Fey NNO v Dabelstein*, the right guaranteed in section 34 of the Constitution:

'does not and could hardly ensure that litigants are protected against wrong decisions. On the assumption that section 34 of the Constitution does indeed embrace that right, it would be the fairness and not the correctness of the court proceedings to which litigants would be entitled.'⁷

17. For these reasons, there is no merit to this ground and no prospect that another court would come to a different finding.

(vii) *The court erred in placing undue reliance on the common case fact that the UIF had made rental payments to Vantage, a third party at the time to the UIF*

18. The defendants submit that this court erred in placing undue reliance on this issue. The point is made that if indeed the Facilities Agreement, the Cession and the payments made to Vantage are unlawful for contravening section 217 of the Constitution, Vantage cannot rely on estoppel to make legal what would otherwise be illegal. The judgment sets out the context for this reliance and the defendants' utter disregard for their statutory obligations. There is simply no merit to this ground and no prospect that another court would come to a different conclusion.

⁷ (CCT 60/00) [2001] ZACC 14; 2001 (2) SA 1187 (CC); 2001 (4) BCLR 312 (6 March 2001), paragraph 4.

(viii) *The court erred in awarding costs to the plaintiffs*

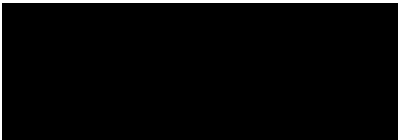
19. The context in which costs were awarded to the plaintiffs is fully set out in the judgment. None of the conclusions reached in the judgment are disturbed by the grounds raised in the defendants' notice of appeal. Costs are a matter for the court in the exercise of its discretion. In view of there being no attack grounded on the issues a court of appeal would take into account when interrogating the manner in which a court of first instance exercised its discretion, there is no likelihood that another court would come to a different finding on this issue.

Conclusion

20. For all the reasons set out in this ruling, the defendants' application for leave to appeal must fail.

Order

1. The application for leave to appeal is dismissed.
2. The defendants are ordered to pay the plaintiffs' costs on scale C, such costs to include the costs of two counsel.



BAM J
JUDGE OF THE HIGH COURT,
GAUTENG DIVISION,
PRETORIA

Date of Hearing: 18 February 2025

Date of Judgment: 26 March 2025

Appearances:

Counsel for the Applicants: Adv G.W Amm SC, with him Adv S.G
Dos Santos

Instructed by: Cliffe Dekker Hofmeyr Inc
c/o Macrobert Attorneys
Brooklyn, Pretoria

Counsel for the Respondents: Adv W Mokhare SC, with him Adv T
Mabuda

Instructed by: The State Attorney
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