

**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NO: 2024-008520

In the matter between:

BLACK ROYALTY MINERALS KOORNFONTEIN (PTY) LTD. APPLICANT

and

THE SHERIFF, MIDDELBURG

FIRST RESPONDENT

KWIKSPACE MODULAR BUILDINGS (PTY) LTD. SECOND RESPONDENT

JUDGMENT: LEAVE TO APPEAL

THOBANE AJ,

Introduction

[1] This is an application for leave to appeal against the judgment and order of this court handed down on 22 November 2024. The applicant contends that the appeal is brought in terms of both sections 17(1)(a)(i) and (ii) of the Superior Courts Act, 13 of 2010. Leave is sought to appeal to the Supreme Court of Appeal alternatively to the full court of the Gauteng Division of the High Court. The application, which is opposed by the second respondent, is said to be directed at the court's findings of facts and questions of law.

[2] In the notice of application for leave to appeal, the applicant lists various grounds, which are set out below, on which the application for leave to appeal is founded in so far as reliance is placed on section 17 (1)(a)(i). With regards to section 17 (1)(a)(ii), the applicant argues that the compelling reason why leave should be granted is the question whether in a vindication application a party can 'rock up'

anywhere and vindicate his rights even in circumstances where that, party against whom the execution is directed, was not a party to the proceedings where the order sought to be executed was obtained.

[3] The applicant contends that the court erred and misdirected itself on the following summarised grounds;

- 3.1. In finding that the order was served on Black Royalty Minerals (Pty) Ltd, an entity against which the order of Dlamini J was obtained, simply because they share premises with the applicant. The applicant confirmed that service, to be exact, execution is disputed;
- 3.2. In finding that the applicant does not have *locus standi*;
- 3.3. In relying in its finding on the judgment of Nyati J, particularly the portions of the judgment that deal with the legal personality of the two entities; their sharing of offices and the conflict of interest; the applicant's silence on the possession of the modular units and the raising of contrived and technical defences by the applicant;
- 3.4. In finding that there was an obligation on the applicant to challenge the order merely because they did not agree with it;
- 3.5. In finding that the order could be executed against the applicant even though it was not obtained against it;
- 3.6. In finding that the applicant came into possession of the modular units through Black Royalty Minerals (Pty) Ltd and lastly;
- 3.7. In the exercise of its discretion, by awarding costs against the applicant on a punitive scale.

The law

[4] It is now trite that the threshold in an application for leave to appeal since the advent of the Superior Courts Act has been raised. That much was said in *The Mont Chevaux Trust (IT2012/28) v Tina Goosen & 18 Others*¹, where Bertelsmann J held as follows:

¹ *The Mont Chevaux Trust (IT2012/28) v Tina Goosen & 18 Others* LCC14R/2014, 2014 JDR 2325 (LCC) at para 6. See also *Acting National Director of Public Prosecutions and Others v Democratic Alliance* [2016] ZAGPPHC 489 (24 June 2016).

‘It is clear that the threshold for granting leave to appeal against a judgment of a High Court has been raised in the new Act. The former test whether leave to appeal should be granted was a reasonable prospect that another court might come to a different conclusion.....The use of the word “would” in the new statute indicates a measure of certainty that another court will differ from the court whose judgment is sought to be appealed against’.

[5] The full court of this Division in *Fairtrade Tobacco Association v President of the Republic of South Africa*² likewise held that-

‘As such, in considering the application for leave to appeal, it is crucial for this Court to remain cognisant of the higher threshold that needs to be met before leave to appeal may be granted. There must exist more than just a mere possibility that another court, the SCA in this instance, will, not might, find differently on facts on law.’

[6] The SCA in *Smith v S*³, per Plasket AJA, had occasion to consider what constitutes reasonable prospects of success as envisaged in section 17(1)(a)(i) and held:

‘What the test of reasonable prospects of success postulates is 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 order to succeed, therefore, the appellant must convince this court on proper grounds that he has prospects of success on appeal and that those prospects are not remote but have a realistic chance of succeeding. More is required to be established than that there is a mere possibility of success, that the case is arguable on appeal or that the case cannot be categorised as hopeless. There must, in other words, be a sound, rational basis for the conclusion that there are prospects of success on appeal.’

² *Fairtrade Tobacco Association v President of the Republic of South* (21688/2020) [2020] ZAGPPHC 311 (24 July 2020).

³ *Smith v S* 2012 (1) SACR 567 (SCA) at para 7. See also *MEC for Health, Eastern Cape v Mkhitha and Another* [2016] ZASCA 176 at para 17.

[7] It is with the aforesaid principles and case law in mind that this court approaches the application for leave to appeal on the grounds that are considered in turn below.

Service or execution of the order

[8] It is not in dispute that the order of Dlamini J was properly served on the party against whom it was obtained, namely, Black Royalty Minerals (Pty) Ltd. That much is conceded by the applicant in the heads of argument⁴. The applicant however takes issue with the execution process. The contention by the applicant with regards to execution is that the second respondent sought to execute the order against the applicant, who was not party to the proceeding and was not cited in the said order.

[9] The applicant develops the proposition further and submits that its main argument is that Black Royalty Minerals (Pty) Ltd and Black Royalty Minerals Koornfontein (Pty) LTD (the applicant), are two separate legal entities in terms of the Company Laws of the Republic of South Africa and that such status, that of being separate legal identities, is supported by case law⁵. For that reason, execution of the order ought to be carried out on the correct entity. The fact that the two entities share the same registered address, is of no moment, it was submitted.

[10] At all times when deciding the matter, the court was alive to the fact that the two entities mentioned above are separate. Further, it was common cause at the hearing of the application that there exists two separate entities and such common cause was captured not only in the judgment but also in the joint Practice Note of the parties. Given that fact, I am inclined to agree with the submission by counsel for the second respondent that the issue about separate legal entities is simply a red herring. Whereas the applicant expatiates and refers to case law in submitting that there are instances where the court can pierce the corporate veil, such submissions are simply misplaced because there has been no conflation of the two entities and no confusion as to the execution of the order. Execution of the order is directed at

⁴ CaseLines 28-6 at paragraph 8.

⁵ *Salomon v Salomon & Co Ltd* [1897] AC 22 (HL), *Nel v Metequity Ltd* [2006] SCA 140 (RSA), *The Shipping Corporation of India Ltd v Evdomon Corporation and Another* 1994 (1) SA 550 (A) at 566 C-F.

Black Royalty Minerals (Pty) Ltd, whether or not they share premises with the applicant, as well as any other person who came to possess the modular units through them. I am of the view that as a ground of appeal, which the applicant submits is its main ground, this ground lacks merit and therefore offers no prospects of success of the appeal.

Locus standi

[11] In the notice of application for leave to appeal the applicant states as one of the grounds that the court erred and misdirected itself in its finding that the applicant lacks *locus standi*. However, in its judgment the court made no such finding. This ground of appeal is equally without merit.

The Nyati J judgment

[12] The applicant contends that the court erred and misdirected itself in relying on some excerpts from the judgment of Nyati J. In those excerpts, the applicant is criticised by Nyati J who found that the applicant contrived a stratagem to evade obligations that arose from an order of this court; that there clearly was an inevitable and deliberate conflict of interest where two companies share premises as well as board members; that the silence of the applicant on the whereabouts of the modular units as well as the applicant's failure to challenge the court order and lastly that the applicant had utilized technical and peculiar defences with the intent to defeat the ends of justice. The applicant however does not indicate why it is contended that quoting the excerpts from the judgment amounts to an error of law or fact or that it is a misdirection. During argument, counsel submitted that the contention is premised on the fact that Nyati J was ceased with an urgent application which he dismissed on the basis of lack of urgency and that the facts or merits of the application were not considered. Such a proposition is not only inaccurate but is also untenable simply because in urgent applications, urgency is informed by facts. In *MM v N M and Others*⁶, the Court stated the following with regards to facts and urgency:

"The import of this is that the test for urgency begins and ends with whether the applicant can obtain substantial redress in due course. It means that a matter will be

⁶ *MM v N M and Others* [2023] ZAKZPHC 122

urgent if the applicant can demonstrate, with facts, that the applicant requires immediate assistance from the court, and that if his application is not heard on an urgent basis that any order that he might later be granted will by then no longer be capable of providing him with the legal protection he requires.” (Underlining is my emphasis).

There is therefore no merit in the argument advanced as underpinning this ground.

Challenge of and execution of the order

[13] The applicant does not agree with the court in its finding that the order of execution stands until set aside and that if the applicant is aggrieved thereby, it should challenge it. The applicant further asserts that no such obligation exists in that the applicant was not a party to the proceedings when the order was obtained. The order was obtained against Black Royalty (Pty) Ltd *“and all persons holding under it...”*, the modular buildings or units. The applicant need not be specifically cited in the order of execution, for if the applicant possesses or “holds” the modular buildings under Black Royalty (Pty) Ltd, execution can be effected on it. Of this the applicant is aware because of the many deliberately missed opportunities to indicate whether or not it holds the modular buildings under Black Royalty (Pty) Ltd. Instead, the applicant chooses to argue that there is no such evidence. This posture is a contributing factor to the award of costs, which is dealt with below, on a punitive scale.

[14] The applicant argues in the heads of argument as follows;

‘The applicant contends further that the issue for determination by the above Honourable Court was never about the validity of the Dlamini J Order but instead it was about the execution of the said Order against a party or entity not cited in the order or against whom the order was never obtained.’.

The court was alive to that question and in fact answered it in the affirmative in the judgment in paragraph 12 thereof when it held as follows;

‘[12] Very early during argument counsel for the applicant posed two questions, namely; whether a party who is not mentioned in an order can be executed against and secondly, whether can an attachment be made without an order. The propositions mentioned by counsel are detached from and not consistent with the facts of the matter as well as to the order of Dlamini J. The order of vindication is

directed at Black Royalty Minerals (Pty) (Ltd), as the possessor of the modular units as well as any other person or entity who possess them through Black Royalty Minerals. It seems to me self-evident that if the applicant came into possession of the modular units through Black Royalty Minerals (Pty) (Ltd), something they have deftly avoided to mention, the reach of the order will engulf them. Therefore, the answer to the first question is in the affirmative. Even if not specifically mentioned by name in the order, provided they possess the modular units through Black Royalty Minerals, they can be executed against....’

The applicant offered no authority for the proposition that an order can only be executed against a party who is specifically cited in it. The fact that the order is directed at ‘all persons who hold...’ the modular buildings or units, means that execution can be carried out against the applicant. I am not persuaded that this ground as a ground of appeal has reasonable prospects of success.

Costs

[15] The applicant argues that the award of costs against it on a punitive scale was unwarranted in that the applicant sought to protect its rights by seeking to interdict enforcement of an order not obtained against it. The applicant leaves the question open, whether or not there was merit in the challenge.

[16] It is a trite principle of our law that costs follow the result⁷. The result went against the applicant. Therefore, costs should follow. Equally trite is a basic rule of our law that an award of costs is in the discretion of the court and such discretion is to be exercised judicially⁸. In *Kruger Bros & Wasserman v Ruskin*⁹ Innes CJ held that:

‘the rule of our law is that all costs – unless expressly otherwise enacted – are in the discretion of the Judge. His discretion must be judicially exercised, but it cannot be challenged, taken alone and apart from the main order, without his permission.’

⁷ *Khumalo and Another v Twin City Developers (Pty) Ltd and Others* [2017] ZASCA 143.

⁸ See *Ferreira v Levin and Others*; *Vryenhoek & Others v Powell NO & Others* [1996] ZACC 27; 1996 (2) SA 621 (CC); and *Motaung v Mukubela & Another NNO*; *Motaung v Mothiba NO* 1975 (1) SA (O) at 631A.

⁹ *Kruger Bros & Wasserman v Ruskin* 1918 AD 63 at 69.

[17] On behalf of the second respondent it was submitted that the award of costs was appropriate and in addition counsel argued that the application for leave to appeal should be dismissed and further that costs are to be awarded against the applicant on a scale as between attorney and own client in view of the fact that the applicant has persisted with litigation on a frivolous and unreasonable basis about five times and lost on each occasion.

[18] It is simply not sufficient to argue that the pursuit of litigation by the applicant was and is in an endeavour to protect the applicant's rights and that therefore the pursuit of litigation was justified. The second respondent obtained an order which is to be executed at Koornfontein mine on Black Royalty Minerals (Pty) Ltd or any other person who holds or possesses the modular buildings or units. The applicant, who does not indicate what his rights are in relation to the modular units, does not indicate if it possesses same and does not indicate which and how, if at all, its rights will be affected by the order, has over a period of time sought to prevent or interdict the execution of the order. It is therefore appropriate for the court to show its displeasure at how the applicant has gone about frustrating the efforts of the second respondent. The applicant's actions are patently an abuse of process justifying costs on a punitive scale. It is my view that there are no prospects whatsoever that another court will find otherwise. Case law relied upon in the judgment in my view underscores the fact that an award of costs on a punitive scale is justified.

Conclusion

[19] Whereas the applicant contends that the court in some instances erred and in others misdirected itself on the law and the facts, the applicant failed to clearly articulate the basis of such contentions. There is therefore no reason to believe that the appeal has reasonable prospects of success. The applicant further argued that leave is sought on the basis of both section 17 (1)(a)(i) and 17 (1)(a)(ii) of the Superior Courts Act. It was further submitted that the basis for the contention that there is some other compelling reason why leave ought to be granted was the question whether execution can be carried out against a person or a party that is not cited in the order. I am of the view that it is settled law and therefore there is no novelty in seeking an answer to that question. Over and above the finding that there are no reasonable prospects of the appeal succeeding on the stated grounds of

appeal, I find that there are no other compelling reasons why leave to appeal should be granted.

Order

[20] The following order is made;

1. The application for leave to appeal is dismissed and;
2. The applicant is directed to pay the costs on a scale as between attorney and client.

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

APPEARANCES:

For Applicant	: Adv. M C Ntshangase
Instructed by	: CJ Mkhavele Inc. Pretoria .
For Respondent	: Adv. S Mulligan
Instructed by	: Nixon and Collins Attorneys Pretoria.

Date of the hearing : 17 April 2025

Date of judgment : 22 April 2025 - *This judgment was handed down electronically by circulating to the parties' legal representatives by e-mail, by being uploaded to the CaseLines platform of the Gauteng Division and by release to SAFLII. The date and time of hand down is deemed to be 10:00 on 22 April 2025.*