



**IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN**

Not reportable

Case no: 223/2020

In the matter between

FREDERICK JAKOBUS SENEKAL

First Applicant

FJ SENEKAL INC

Second Applicant

and

MACHTILT SUSANNA FERREIRA

Respondent

In re:

MACHTILT SUSANNA FERREIRA

Plaintiff

and

FREDERICK JAKOBUS SENEKAL

First Defendant

MATSEPES (BLOEMFONTEIN) INC

Second Defendant

FJ SENEKAL INC

Third Defendant

Coram: Naidoo J

Heard: Heads of Argument filed for Consideration in Chambers

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email. The date and time for hand-down of the judgment is deemed to be 11h00 on 6 March 2025.

Summary: civil law – applications for leave to appeal and cross appeal – no prospect of success in application for leave to appeal – reasonable prospects of success in cross-appeal.

ORDER

1. The application for leave to appeal is dismissed with costs.
 2. The application for leave to cross-appeal is granted.
 3. The costs of the cross-appeal are to be costs in the appeal.
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JUDGMENT

Naidoo J

[1] These are applications for leave to appeal and to cross-appeal against the judgment and orders handed down by this court on 8 December 2023. The applicants in this application were the first and third defendants in the trial of this matter and the respondent was the plaintiff. I will refer to the first applicant as Mr Senekal and the respondent as Ms Ferreira. I will refer to the second applicant as such, and where necessary, to Mr Senekal and the second applicant, collectively as the applicants. Mr Senekal and the second applicant seek leave to appeal only the costs order made against them, while Ms Ferreira applies for leave to cross-appeal the judgment and order in the main action.

Leave to Appeal

[2] The applicants assail the costs order, in essence, on the grounds that the court committed errors of law and fact. With regard to the errors of law, the applicants allege that the court failed to exercise the discretion pertaining to costs judiciously in that:

- a) it failed to take into account all the relevant circumstances of the matter and considered only 'the deliberate and intentional actions of Mr Senekal and other functionaries of the 1998 and 2003 companies';
- b) if the court had taken account of all the relevant facts, a proper exercise of the discretion pertaining to costs would have resulted in the principle 'costs follow the result' being applied and the applicants would have been awarded costs.

[3] With regard to errors of fact, the applicants assert that the court erred in holding that:

- a) Ms Ferreira was obliged to go through protracted litigation before she learned the true identity of the second defendant because she was placed under a misapprehension about the true identity of the second defendant by the deliberate actions of Mr Senekal and the functionaries of the 1998 and 2003 companies;
- b) the said conduct of Mr Senekal and other functionaries was deliberate and intentional, as there was no evidence to support this finding.

[4] The applicants further asserted that the court should have held that whatever the acts of Mr Senekal and the other functionaries might have been in relation to the identity of the two companies, such acts had no bearing on the merits of Ms Ferreira's claim. The appellants then proceeded to re-hash the evidence and raised certain facts, for the first time, that the court ought to have considered in awarding costs. While I do not propose to repeat all such submissions, an example is that Ms Ferreira's claim was based on the *condictio indebiti*, and as such, she could only have claimed from the recipient or party whose estate had been enriched at her expense. I also point out that other than a request for a costs order in their favour, no further submissions were made by the applicants in respect of costs

Leave to Cross-Appeal

[5] Ms Ferreira assailed the judgment on various grounds, which in essence are that the court erred in:

- a) not finding, based on Mr Senekal's version, that he was never in possession of a valid Fidelity Fund Certificate (FFC) for the period 1 January to 21 June 2017;
- b) finding that the FFC was validly issued;
- c) ignoring Mrs Van Der Merwe's evidence that there is no official practice rule or section of the Legal Practice Act (LPA) which allows for the issuing of a FFC without a clean audit, and that it was done out of leniency in good faith, and in the hope that an unqualified audit would be submitted;
- d) not finding that the FFC issued on 14 December 2016 was issued contrary to the Act, which required a clean audit. Therefore, s42(4) is applicable;
- e) accepting Mr Senekal's version that he was in possession of a valid FFC, even though he did not testify to that effect; and
- f) not finding that Ms Ferreira had proved that Mr Senekal practiced without a FFC

for the period 1 January to 21 June 2017, and that she was entitled to succeed in her claim, with costs.

[6] Section 17 of the Superior Courts Act 10 of 2013 regulates the test to be applied in an application for leave to appeal. The relevant provisions of s 17(1) provide as follows:

'(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'

[7] It has been held in a number of cases that an applicant was, previously, merely required to show that there is a reasonable possibility that another court, differently constituted, would find differently to the court against whose judgment leave to appeal is sought. It is clear from s 17(1), set out above, that there has been a change in the threshold required to be met before leave to appeal will be granted. An applicant for leave to appeal is required to convince the court that there is a reasonable prospect of success and not merely a possibility of success.¹

[8] In a decision of the Supreme Court of Appeal (SCA) in *Ramakatsa and Others v African National Congress and Another*² (*Ramakatsa*), the following extract from para 10 of the judgment is relevant:

'I am mindful of the decisions at high court level debating whether the use of the word 'would' as opposed to 'could' possibly means that the threshold for granting the appeal has been raised. If a reasonable prospect of success is established, leave to appeal should be granted. Similarly, if there are some other compelling reasons why the appeal should be heard, leave to appeal should be granted. 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

¹ See in this regard *The Mont Chevaux Trust v Tina Goosen + 18 2014 JDR LCC*, which was cited with approval in a number of cases, such as *Matoto v Free State Gambling and Liquor Authority* [2017] ZAFSHC 80, a decision emanating from this Division, and also a Full Court decision in *Acting National Director of Public Prosecutions and Others v Democratic Alliance* [2016] ZAGPPHC 489.

² *Ramakatsa and Others v African National Congress and Another* [2021] ZASCA 31 (31 March 2021)

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’.

[9] With reference to both the leave to appeal and to cross-appeal, the judgment in this matter sets out fully the reasons for the orders made, and I do not intend to repeat those here. The judgment was clear that the findings of the court are applicable only in this case, based on the evidence put before the court. I will deal firstly with the application for leave to appeal and thereafter with the leave to cross-appeal.

[10] With regard to the issue of costs, it is well established in our law that a trial court, or court of first instance, has a wide discretion in awarding costs. However, it is equally trite that such discretion must be exercised judiciously, after taking into consideration all relevant factors. An appeal court will generally be reluctant to interfere with a costs order, and an appeal against a costs order is an exception. While as a general rule, the successful party should be awarded his costs, there are number of exceptions or reasons for a court to deprive such a party of his costs. In *Ferreira v Levin*,³ the Constitutional Court, recognizing, in para 3 that an award of costs is in the discretion of the presiding judicial officer, also said that:

‘ . . . depriving successful parties of their costs can depend on circumstances such as, for example, the conduct of the parties, the conduct of their legal representatives, whether a party achieves technical success only, the nature of the litigants and the nature of the proceedings.’

Unless a court has misdirected itself or committed a gross misdirection, an appeal court will not easily entertain an appeal in respect of costs only. In the present matter, the applicants have not shown misdirection to the extent that an appeal court will be inclined to intervene. The application for leave to appeal must, therefore, fail.

[11] I turn now to deal with the application for leave to cross-appeal. As I indicated, the judgment sets out fully the court’s reasons for judgment. On the grounds set out by the Ms Ferreira, I am not persuaded that such grounds have been shown to enjoy success on appeal. I am, however mindful of what the SCA, in *Ramakatsa*, said further in para 10 of its judgement, that a court should take into consideration the provisions of section 17(1)(a)(ii) of the Superior Courts Act 10 of 2013, and even:

‘ . . . 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. Compelling reason

³ *Ferreira v Levin NO and Others, Vryenhoek and Others v Powell NO and Others* [1996] ZACC 27; 1996 (2) SA 621 (CC)

would of course include an important question of law or a discreet issue of public importance that will have an effect on future disputes. However, this Court correctly added that 'but here too the merits remain vitally important and are often decisive.'

In my view, the issue of the validity of a FFC issued without an unqualified audit and the retrospective invalidity of a FFC, where a qualified audit was submitted after the issue of the FFC, does not appear to have occupied much judicial attention. It is however, an issue which is of importance not only to the parties in this matter, but to the profession in general as well as the public. It may well be decided differently by another court. For this reason, I am of the view that the application to cross- appeal should succeed.

[12] In the circumstances, I make the following order:

1. The application for leave to appeal is dismissed with costs.
2. The application for leave to cross-appeal is granted.
3. The costs of the cross-appeal are to be costs in the appeal.


NAIDOO J

Appearances

For the Applicant:

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