

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

Reportable: YES/NO
Of interest to other Judges: YES/NO
Circulate to Magistrates: YES/NO
Case no: 570/2024

In the matter between:

HANDAX MACHINERY (PTY) LTD

Applicant/1st Respondent

and

NALA LOCAL MUNICIPALITY

1st Respondent/Applicant

MABOELA FORESTRY & CONSTRUCTION CC

2nd Respondent/2nd Respondent

Neutral citation: Handax Machinery (Pty) Ltd v Nala Local Municipality
& 1 Other (Leave to Appeal) (570/2024)

Coram: Van Zyl, J

Heard: 9 September 2024

Delivered: 7 March 2025

Summary:

Application for leave to appeal – Spoliation Order – The application for leave to appeal, dismissed, with costs, counsel’s fees on scale B.

ORDER

1. The application for leave to appeal is dismissed, with costs, with counsel’s fees to be taxed on scale B.

JUDGMENT

Van Zyl, J

[1] This is an application for leave to appeal against the order which I made and the judgment I delivered in terms whereof I granted condonation on the basis of urgency in terms of rule 6(12) and granted a spoliation order and ancillary relief, with costs, in favour of the applicant in that application (Nala Local Municipality).

[2] The present applicant was the first respondent in the spoliation application ('Handax') and the present first respondent was the applicant ('Nala'). The present second respondent was also the second respondent in the spoliation application ('Maboela'). Maboela did not oppose the spoliation application and is also not opposing this application for leave to appeal. The crux of the order was contained in paragraph 2 thereof:

'2. The first respondent is ordered to forthwith restore the applicant's free and undisturbed possession of the two trucks, to wit: two Powerstar 6M3 Tipper Trucks 2628 6x4 with vehicle identification numbers (VIN) LBZ[...]2 and LBZ[...]7, respectively, and within 2 days of this order being served on the first respondent.'

Leave to appeal legal principles:

[3] Section 17(1)(a) of the Superior Courts Act, 10 of 2013 ('the Act'), determines as follows:

'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;
- (b) ...' (My emphasis)

[4] In *Acting National Director of Public Prosecutions v Democratic Alliance In Re Democratic Alliance v Acting National Director of Public Prosecutions* (19577/09) [2016] ZAGPPHZ 489 (24 June 2016), the court held (at paragraph 25 of the judgment) that the Act has raised the bar for granting leave to appeal and in this regard it referred to the judgment of *The Mont Chevaux Trust (IT 2012/28) v*

Tina Goosen and 18 Others 2014 JDR 2325 (LCC), where the following was stated:

‘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, see **Van Heerden v Cronwright & Others 1985 (2) SA 342 (T) at 343H**. 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.’

See also *Rohde v S* 2020 (1) SACR 329 (SCA) para 8 and *Fair-Trade Independent Tobacco Association v President of the Republic of South Africa and Another* (21688/2020) [2020] ZAGPPHC 311 (24 July 2020) para 4.

[5] In *Municipality of Thabazimbi v Badenhorst* (66933/2011) [2024] ZAGPPHC 195 (26 February 2024) paras 9 – 10 the court also dealt with the more stringent test for an application for leave to appeal and held, *inter alia*, as follows:

‘[9] ... 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. ...

[11] In *MEC Health, Eastern Cape v Mkhitha* (1221/2015) [2016] ZASCA 176 (25 November 2016) the Supreme Court of Appeal held:

" ... [17] *An applicant for leave to appeal must convince the court on proper grounds that there is a reasonable prospect or realistic chance of success on appeal. A mere possibility of success, an arguable case or one that is not hopeless, is not enough. There must be a sound, rational basis to conclude that there is a reasonable prospect of success on appeal.*"

[6] In considering whether there is some other compelling reason why the intended appeal should be heard, as provided for in section 17(1)(a)(ii) of the Act, an important question of law or a discrete issue of public importance that will have an effect on future disputes, may constitute such a compelling reason. However, the merits thereof still need to be considered in deciding whether to grant leave to appeal or not. In *Caratco (Pty) Ltd v Independent Advisory (Pty) Ltd* 2020 (5) SA 35 (SCA) para 2 the Supreme Court of Appeal determined as follows in this regard:

‘[2] In order to be granted leave to appeal in terms of s 17(1)(a)(i) and s 17(1)(a)(ii) of the Superior Courts Act an applicant for leave must satisfy the court that the appeal would have a reasonable prospect of success or that there is some other compelling reason why the appeal should be heard. If the court is unpersuaded of the prospects of success, it must still enquire into whether there is a compelling reason to entertain the appeal. A compelling reason includes an important question of law or a discrete issue of public importance that will have an effect on future disputes. *But here too, the merits remain vitally important and are often decisive. Caratco must satisfy this court that it has met this threshold.*’ (My emphasis)

See also *Poulter v Commissioner for South African Revenue Service* (Leave to Appeal) (A88/2023) [2024] ZAWCHC 100 (28 June 2024).

[7] Uniform rule 49(1)(a) and 49(4) determine, respectively, as follows:

‘(1)(a) When leave to appeal is required, it may on a statement of the grounds therefor be requested at the time of the judgment or order.

...

(4) Every notice of appeal and cross-appeal shall state —

(a) what part of the judgment or order is appealed against; and

(b) the particular respect in which the variation of the judgment or order is

sought.

Merits of the application for leave to appeal:

Introduction:

[8] Ms Ferreira, on behalf of Handax, prepared very comprehensive heads of argument and also presented detailed submissions in her oral argument. Mr Louw, on behalf of Nala, also prepared very valuable heads of argument and duly responded to the oral submissions of Ms Ferreira. I am indebted to both counsel. However, I do not intend dealing with all the submissions in detail. I also do not consider it necessary to repeat the factual background, as same is already recorded in detail in my judgment. I have, however, considered all the submissions of the respective counsel.

Appealability:

[9] I *mero motu* raised the question of the appealability, or not, of a spoliation order. I am indebted to Mr Louw who filed supplementary heads of argument on the said issue. He referred me to relevant authority on the basis of which it is evident that a spoliation order is regarded as a final order and therefore indeed appealable. See, *inter alia*, *Nienaber v Stuckey* 1946 AD 1049 at 1053; *Ntenzeni v Magistrate, Sterkspruit* [1996] 2 All SA 148 (Tk) and *King Sabata Dalidyebo Local Municipality v Noah* [2018] JOL 40325 (ECM).

The contents of the notice of application for leave to appeal:

[10] It was submitted on behalf of Nala that the notice of application for leave to appeal is fatally defective in that it does not comply with the prescripts and principles as set out in, *inter alia*, *Songono v Minister of Law and Order* 1996 (4) SA 384 at 385I – J and *Ntsoereng v Sebofi; In re Sebofi v Ntsoereng* [2018] JOL 39920 (FB). Mr Louw submitted that on this basis alone, the application stands to be dismissed with costs.

[11] From a reading of the notice of application for leave to appeal I agree that the grounds are not set out as clearly and succinctly as they ought to have been. Even background facts contained in my judgment, which do not amount to findings, are set out as ‘grounds’ for the application for leave to appeal. In the said notice it is also not contended that the appeal would have reasonable prospects of

success, but merely that 'there is a possibility that another court shall find that the Honourable Court erred', which is clearly not the required test.

[12] However, despite the aforesaid valid criticism I consider it in the interest of the parties that the merits of the application be adjudicated in order to bring the matter closer to finality. I am consequently willing to condone the defects in the notice of application for leave to appeal.

Urgency:

[13] The same arguments which were presented during the hearing of the spoliation application as to why condonation should not be granted to Nala, were repeated on behalf of Handax. I have duly and fully dealt with the issue of urgency in my judgment and exercised my discretion accordingly. In my view there is not a reasonable prospect that the intended appeal will succeed on the issue of urgency.

Authority of the Municipal Manager:

[14] I have dealt with this issue in detail in my judgment, with reference to authority. Mr Louw, in his heads of argument, also cited the judgment of *Koster, Berdy Swartruggens Tax Payers Association v Khetleng River Local Municipality* (CIVAPP5) [2016] ZANWHC 38 (17 June 2016) paras 4-9, where a similar point was dealt with by the Full Court of the North West High Court. In my view the intended appeal has no reasonable prospect that it will succeed on this point.

[15] In respect of the argument raised by Handax that the 10-day period stipulated in Rule 7 had not yet expired at the time the application was heard, it was for Handax to have issued a Rule 7 notice immediately after having received the application papers and not wait for 10 days, considering that the application was brought on an urgent basis. There was also no indication in the answering affidavit that Handax still intended to issue such a notice, nor did Handax request a postponement to grant it such an opportunity.

Contractual right to ownership of the trucks:

[16] An argument which was not raised by Handax during the hearing of the spoliation application, is that Handax holds the ownership of the trucks in terms of the contract concluded between Handax and Maboela until the trucks had been fully paid by Maboela.

[17] It is trite that for purposes of spoliation two allegations must be made and proved, which requirements I also referred to in my judgment, with applicable authority in support thereof:

‘(a) that the applicant was in possession of the property; and
(b) that the respondent deprived him of the possession forcibly or wrongfully against his consent.’

[18] In *Erasmus Superior Court Practice*, DE van Loggerenberg, at D7-2 to D7-3 the following principles are stated with reference to applicable authority:

“The reason behind the practice of granting spoliation orders is that no man is allowed to take the law into his own hands, and to dispossess another illicitly of possession of property. This applies equally whether the despoiler is an individual or a government entity or functionary. If he does so, the court will summarily restore the *status quo ante*, and will do that as a preliminary to any inquiry or investigation into the merits of the dispute. The rule is *spoliatus ante omnia restituendus est*. A court hearing a spoliation application does not concern itself with the rights of the parties (whatever they may have been) before the spoliation took place; it merely inquires whether or not there has been a spoliation, and if there has been, it restores the *status quo ante*. In spoliation proceedings the court will, therefore, neither enter into the lawfulness of the applicant’s possession, nor into the question of ownership.’ (My emphasis)

See also *Rayi v Gxabeka and a related matter* (Leave to Appeal) [2023] JOL 58357 (ECP) paras 4 – 8 and 12 - 13.

[17] However, Handax relies, *inter alia*, on *Street Pole Ads Durban (Pty) Ltd v Ethekeweni Municipality* 2008 (5) SA 290 (SCA) where the court held as follows at para 15:

[15] This argument invokes the principle that an offending respondent in a spoliation application is generally not allowed to contest the spoliated applicant's title to the property. *That is because good title is irrelevant: the claim to spoliation relief arises solely from an unprocedural deprivation of possession. There is a qualification, however, if the applicant goes further and claims a substantive right to possession, whether based on title of ownership or on contract. In that case "the respondent may answer such additional claim of right and may demonstrate, if he can, that applicant does not have the right to possession which it claims".* This is because such an applicant "in effect forces an investigation of the issues relevant to the further relief he claims. Once he does this, the respondent's defence in regard thereto has to be considered".' (My emphasis)

[18] Handax similarly relies on *Stocks Housing (Cape) (Pty) Ltd v Chief Executive Director, Department of Education and Culture Service* [1997] JOL 294 (C); 1996 (4) SA 231 (C) at 244C - D:

'The qualification to the rule that a person who has been despoiled of possession must be restored to possession before any dispute as to who is entitled to possession will be investigated is that, *if the applicant goes further than to claim spoliation relief*, and claims a substantive right to possession, whether based upon a vindication or upon contract, then the respondent may answer such additional claim of right and may demonstrate, if he can, that applicant does not have the right to possession which it claims. The Court will not order return of possession of the property in such a case if respondent succeeds in refuting the applicant's claim of right to possession.' (My emphasis)

[19] It was submitted on behalf of Handax that in this matter Nala relies upon the contract of sale it concluded with Maboela in terms whereof they bought the two trucks from Maboela and that a contractual claim is therefore the cause of action of Nala. Handax, therefore, contends that it is entitled to rely on their ownership of the trucks in terms of the contract of sale they concluded with Maboela; hence, their substantive right to possession on the basis of their ownership.

[20] I cannot agree with the aforesaid submission. As correctly submitted by Mr Louw, the buying of the trucks from Maboela was only mentioned by Nala (and by myself in my judgment) as part of the factual background as to how they came to be in possession of the trucks. It does not constitute the cause of action of Nala.

The cause of action and the nature of the relief sought by Nala is clearly merely based on the factual free and undisturbed possession of the trucks and the wrongful and unlawful deprivation thereof by Handax.; hence, spoliation. Nala did not 'go further' by claiming any substantive right to possession. This is evident from paragraphs 35, 37 and 38 of the founding affidavit, under the heading 'The Spoliation':

'35. The Applicant had purchased the trucks and was in free, peaceful and undisturbed possession thereof when the 1st Respondent deprived the Applicant of the said trucks unlawfully.

36. ...

37. Any dispute pertaining to the ownership of the trucks seems to be vis-à-vis the Respondents and has nothing to do with the Applicant.

38. The 1st Respondent deprived the Applicant of its possession without a valid Court Order, warrant or any other legal process.'

[21] There is consequently no reasonable prospect that the appeal would succeed on this ground.

The spare keys:

[22] Handax relies on *De Beer v Zimbali Estate Management Association (Pty) Ltd* 2007 (3) SA 254 (N) and similar authority for the submission that due to the fact that Handax had the spare keys of the truck, Nala was not in exclusive possession of the trucks. However, the authority being relied upon by Handax is, in my view, factually distinguishable from the present matter, in that those matters dealt with buildings to which various people had access by means of keys, discs and alike and where the court found that 'in the present case' possession was so watered down that it ceases to become the sort of possession that is required to obtain the protection of a spoliation order. That is a far cry from the facts in the present matter. Having had the spare keys did not give joint possession of the trucks to Handax. There is no basis upon which I can find that this ground of appeal has any reasonable prospect that it will succeed on appeal.

Unlawful deprivation of possession:

[23] It is the submission on behalf of Handax that the removal of the trucks was not unlawful since the trucks were removed with the knowledge and consent of the duly authorized representative of Nala. However, I fully dealt with the relevant authority and evidence on this issue at paragraphs 54 – 57 of my judgment. Having again considered all the evidence, facts and circumstances I cannot find that this ground of appeal has any reasonable prospect of succeeding on appeal.

Conclusion:

[24] I have to agree with the submission of Mr Louw that the intended appeal is wholly unmeritorious, both on factual and legal basis. There is no reasonable prospect that it will be successful.

[25] Handax did not cite a single ground in its notice of application for leave to appeal that there is a compelling reason why the appeal should be heard as provided for in section 17(1)(a)(ii) of the Act. Contrary hereto, Ms Ferreira submitted in her heads of argument and during the hearing of oral argument that ‘the issues raised in this matter are of great importance to both parties and the general public’ and that there are ‘numerous conflicting judgments on the issues raised’ by Handax. I cannot agree with these submissions. Although I accept that the matter is of importance to both parties, it deals with spoliation, the principles of which are trite. The issues raised are not novel. Further, there are no conflicting judgments applicable. The distinctions between the respective judgments are as a result of different factual scenarios, not because there are conflicting views on the respective principles. In any event, as evident from the applicable authorities referred to earlier in this judgment, the merits remain vitally important and it is for Handax to satisfy the court that it has met the threshold. Handax has failed to do so.

[26] The application for leave to appeal consequently stands to be dismissed.

Costs:

[27] There is no reason why costs should not follow the outcome.

[28] With reference to Uniform rule 67A(3), read with Uniform Rule 69(7), I agree with *Ghubhelabm (Pty) Ltd v R.A.W. Truck Trading CC* (B3217/2023) [2024] ZAGPPHC 460 (26 April 2024), where the court found as follows at para 27 of the judgment:

‘Costs orders, including the assessment of the appropriate Rule 69 scale, remain a matter for the exercise of judicial discretion.’

[29] In view of the totality of the factors to be considered in terms of Rule 67(A)(3)(b), as well as the facts and circumstances of the present matter, I agree with the submission of both counsel that the appropriate scale of counsel’s fees is scale B.

Order:

[30] The following order is made:

1. The application for leave to appeal is dismissed, with costs, with counsel’s fees to be taxed on scale B.

C. VAN ZYL, J

Appearances

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