

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

LIMPOPO DIVISION, POLOKWANE

CASE NUMBER: 9452/2023

(1)	<u>REPORTABLE: YES/NO</u>
(2)	<u>OF INTEREST TO THE JUDGES: YES/NO</u>
(3)	<u>REVISED.</u>
	
	
	
DATE 8 August 2025	SIGNATURE.....

In the matter between:

SUNSET GAME LODGE CC

**APPLICANT / RESPONDENT IN
MAIN APPLICATION**

-and-

ARTHUR JOHN DA COSTA

**1ST RESPONDENT /
APPLICANT IN MAIN
APPLICATION**

SIMCHA DA COSTA

**2ND RESPONDENT /
APPLICANT IN MAIN
APPLICATION**

Delivered : 8 August 2025

This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail. The date and time for hand down of the judgment is deemed to be **8 August 2025 at 10:00 am.**

Date heard : 9 June 2025

Coram : Bresler AJ

**JUDGMENT
(LEAVE TO APPEAL)**

BRESLER AJ:

Introduction:

[1] The Applicant (Respondent in the Main Application) applies for Leave to Appeal against this Court's judgment and order delivered on the 7th of November 2024.

[2] The Application for Leave to appeal is premised on the following:

2.1 The Court failed to consider the application for referral to trial / oral evidence. In this regard it is also submitted that a serious dispute of fact

ensued, which should have been reasonably anticipated by the Respondent (Applicant in the main application).

2.2 The Court failed to consider, in addition, that the Applicant obtained a contractual right of possession, and that the Respondent, in addition, had to show that there was a valid termination of the right.

2.3 The Respondent failed to establish the valid cancellation of the agreement.

2.4 An agreement is not rendered void if the seller is not the owner.

2.5 The issue of the Kruger-permit is not moot.

2.5 The irregularity of the set down warranted a different cost order.

[3] The Application for Leave to Appeal is opposed.

The Applicable Legal Principles:

[4] An application for leave to appeal is governed by section 17(1) of the **Superior Courts Act**, Act 10 of 2013 which provides:

'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,*
- (b) *the decision sought on appeal does not fall within the ambit of section 16 (2) (a), and*
- (c) *where the decision sought to be appealed does not dispose of all the issues in the case, the appeal would lead to a just and prompt resolution of the real issues between the parties.'*

[2] In **MEC Health, Eastern Cape v Mkhitha**¹ the Supreme Court of Appeal said the following (reference to other authorities omitted):

'[16] Once again it is necessary to say that leave to appeal, especially to this court, must not be granted unless there truly is a reasonable prospect of success. Section 17(1)(a) of the Superior Courts Act 10 of 2013 makes it clear that leave to appeal may only be given where the judge concerned is of the opinion that the appeal would have a reasonable prospect of success; or there is some other compelling reason why it should be heard.

[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

¹ **MEG Health, Eastern Cape v Mkhitha** (1221/15) [2016] ZASCA 176 (25 November 2016)

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.

(own underlining)

[3] Having regard to the Application for Leave to Appeal and the oral arguments submitted by the Applicant, it is clear that the Applicant requires leave to appeal only on the premise that there is a reasonable prospect of success on appeal.

[4] I shall *ad seriatim* address the grounds as summarised herein before.

Referral to trial and / or oral evidence and the existence of a factual dispute:

[5] It is indeed correct that the judgment itself does not make pertinent reference to the exercise of the Court's discretion not to refer the matter to trial.

[6] This does not presuppose that an appeal will succeed. The Court, after all, retains a discretion to refer a matter to trial in an instance where an application cannot be properly decided on affidavit. *In casu*, there was no material factual dispute relevant to the determination of the matter, but rather a dispute as to the interpretation of the agreement between the parties and the law applicable thereto.

[7] As such, the matter was capable of being determined on affidavit and there was no need to determine if the matter should be referred to trial.

[8] This ground therefore yields no prospect of success on appeal.

Valid cancellation and the Respondent's right to remain in possession:

[9] This Court dealt extensively with the right to cancel the agreement in paragraphs [21] to [30] of the judgment read with [33] to [38].

[10] It is common cause between the parties that the lease agreement was cancelled, and the Applicant could not show, on a balance of probabilities that it is entitled to transfer of ownership of the vehicles. Due notification of the cancellation of the agreement was sent, and received, by the Applicant.

[11] This ground thus also does not postulate any prospect of success.

The agreement is not rendered void if the seller is not the owner:

[12] This conclusion has no bearing on the outcome of the matter or the order ultimately granted. As such, it does not take the matter further and does not substantiate a possibility of success on appeal.

The mootness of the issue pertaining to the Kruger-permit:

[13] As already alluded to in the judgment delivered herein, the Applicant conceded that the Kruger-permit constituted part of the *merx* that was intended in the Sale Agreement of the vehicles. The Applicant furthermore argued that the issue of the Kruger-permit was not moot, should the court have found that the cancellation of the agreement was ineffective.

[14] Insofar as the Court made a finding that the sale agreement was duly cancelled and the Respondent is entitled to the return of the vehicles, this issue of the Kruger-permit (on the Applicant's own version) is thus moot.

[15] As such, this also do not create a possibility that an appeal against the judgment and order will succeed in due course.

Appeal against costs:

[16] The court of appeal will interfere where the exercise of the discretion has not been proper, or has been based upon a wrong principle or upon a wrong view of the facts, where the court has purported to exercise its discretion without sufficient legal grounds for doing so, or where the court has wrongly held that it has no discretion at all, or where some well recognized principle or rule with regards to the awarding of costs has been violated.²

² See Herbstein & Van Winsen, *Civil Practice in the High Courts and Supreme Courts of Appeal of South Africa*, 5th ed, 2009, ch 36 – p 1010

[17] In **Merber v Merber**³ the court held as follows:

'[When] a successful party has been deprived of his costs in the trial court, an appeal court will enquire whether there were any grounds for this departure from the general rule, and if there are no such grounds, then ordinarily it will interfere.'

But if there are grounds upon which a reasonable man could have come to the conclusion arrived at then the appellate tribunal in its reluctance to interfere with the discretion of the trial judgment would not set aside the order as to costs given by him merely on the ground that it might have taken a different view of the sufficiency of such grounds.'

[18] To justify interference on appeal, there must thus have been an improper exercise of judicial discretion, i.e. a vitiating of the award of costs by irregularity or misdirection, or the award must have been disquietingly inappropriate.⁴

[19] It is a fundamental principle that, as a general rule, the party who succeeds should be awarded the costs, and this rule should not be departed from except on good grounds.⁵ In **Merber v Merber** *supra* reference is made to the case of **Fripp v Gibbon and Company**⁶ where Lord De Villiers stated at 357:

³ 1948 (1) A 448 (A)

⁴ See **Ward v Sulzer** 1973 (3) SA 701 (A), **Rondalia Assurance Corporation of SA v Page** 1975 (1) SA 708 (A) and **Beinash v Wixley** 1997 (3) SA 721 (SCA).

⁵ See **Pelser v Levy** 1905 TS 466 at 469; **Fripp v Gibbon & Co** 1913 354; **Sackville West v Nourse** 1925 AD 516 and **Letsitele Stores (Pty) Ltd v Roets** 1959 (4) SA 579 (T)

⁶ 1913 AD 354

'In appeals upon questions of costs two general principles should be observed. The first is that the Court of first instance has a judicial discretion as to costs, and the second is that the successful party should, as a general rule, have his costs. The discretion of such Court, therefore, is not unlimited, and there are numerous cases in which courts of appeal have set aside judgments as to costs where such judgments have contravened the general principle that to the successful party should be awarded his costs.'

- [20] In this Court's view, insufficient grounds have been raised to substantiate a conclusion that this Court, in granting costs to the successful party, exercised its discretion improperly.
- [21] This ground thus also do not yield any prospect of success.
- [22] In following the rationale in **Mkhita** *supra*, this court is not convinced that there is a sound, rational basis to conclude that there is a reasonable prospect of success on appeal.
- [23] I am further of the view that there is also no compelling reason why the appeal should be heard and leave to appeal must consequently be refused with the appropriate cost order.

Order:

[24] In the result the following order is made:

24.1 Leave to Appeal is refused with costs including costs to counsel on Scale B.



M BRESLER AJ

ACTING JUDGE OF THE HIGH COURT,
LIMPOPO DIVISION, POLOKWANE

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POLOKWANE HIGH COURT