



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

Case no: **283/2018P**

In the matter between:

BRIGHT IDEA PROJECTS 66 (PTY) LTD t/a ALL FUELS

APPLICANT

and

FORMER WAY TRADE AND INVEST (PTY) LTD

FIRST RESPONDENT

t/a PREMIER SERVICE STATION

LEE BENTZ

SECOND RESPONDENT

STEPHANIE JEAN VAN NIEKERK

THIRD RESPONDENT

K SWART AND COMPANY

FOURTH RESPONDENT

FIRSTRAND BANK LIMITED

FIFTH RESPONDENT

ROWAN ASHLEY LONG N.O.

SIXTH RESPONDENT

ZAHEER CASIM N.O.

SEVENTH RESPONDENT

Coram: Mossop J

Heard: 28 July 2023

Delivered: 28 July 2023

ORDER

The following order is granted:

1. The application for leave to appeal is dismissed with costs.

JUDGMENT

Mossop J:

[1] This is an application for leave to appeal a judgment that I delivered on 27 June 2023. I heard the matter in Pietermaritzburg, but as it happened this session I was stationed at the Durban High Court. I decided that it would be more convenient for counsel, who are both Durban based, if the application for leave to appeal was to be heard in Durban. A time convenient to both counsel was therefore arranged before the commencement of the regular working day to hear the application. I am indebted to them for making themselves available.

[2] The applicant in the application for leave to appeal was the applicant in the application proceedings that led to my judgment. The appearances this morning are as before, with Mr Ramdhani SC appearing for the applicant and Mr Harrison appearing for the first, sixth and seventh respondents. Counsel are thanked for their helpful submissions.

[3] In essence, in my judgment against which leave to appeal is sought, I dismissed the applicant's application insofar as it was premised on the mandament van spolie. I adjourned the applicant's alternative claim based on the *condictio furtiva*, and did the same in respect of the first respondent's counter application. I granted the sixth and seventh respondents' counter application and directed that all monies then being held by the fourth and fifth respondents be paid over to the sixth and seventh respondents. I finally directed that there would be no order as to costs.

[4] While this is an application for leave to appeal, I had no prior sight of the grounds upon which the application was premised. While there was a notice from the applicant that it intended to seek leave to appeal my judgment and that it would later

deliver its grounds of appeal, no such delivery occurred to me. I do not doubt that the notice of application for leave to appeal containing the grounds of appeal was delivered. I proceeded to hear argument on the application and then adjourned for a short while to give myself an opportunity to fully and properly consider the grounds and to digest them. I also took the opportunity to consider a case handed up by Mr Harrison.

[5] Section 17 of the Superior Courts Act, 10 of 2013 (the Act) regulates applications for leave to appeal from a decision of a High Court. It provides 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;
- (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.’

[6] Prior to the enactment of the Act, the applicable test in an application for leave to appeal was whether there were reasonable prospects that the appeal court may come to a different conclusion than that arrived at by the lower court. The enactment of the Act has changed that test and has significantly raised the threshold for the granting of leave to appeal.¹ The use of the word ‘would’ in the Act indicates that there must be a measure of certainty that another court will differ from the court whose judgment is sought to be appealed against.

[7] Leave to appeal may thus only be granted where a court is of the opinion that the appeal would have a reasonable prospect of success, and which prospects are not too remote.² As was stated by Schippers JA in *MEC for Health, Eastern Cape v Mkhitha and Another*³:

¹ *Public Protector of South Africa v Speaker of the National Assembly and Others* (8500/2022) [2022] ZAWCHC 222 (3 November 2022) para 14.

² *Ramakatsa and Others v African National Congress and Another* [2021] JOL 49993 (SCA) para [10]

³ *MEC for Health, Eastern Cape v Mkhitha and Another* [2016] ZASCA 176 para 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.'

[8] I am firmly of the view that the principal relief claimed by the applicant based upon the mandament van spolie is unsound and not justified in law. The authorities make it plain that the money in the applicant's bank account did not belong to it. The money belonged to the applicant's bankers, and they consequently possessed it, not the applicant. As possession is the cornerstone of a claim based upon the mandament, I am satisfied that no other court would come to a different conclusion on this issue than the one to which I came. I acknowledge that Mr Ramdhani is correct in his submission that there is a dearth of authority on the point, as I noted in my judgment. I fear that this is because the principles attaching to the mandament are well known as the principles attaching to money held in a bank account. There are no such decisions because the mandament does not apply.

[9] As regards the applicant's alternative cause of action based upon the *condictio furtiva*, the first respondent's answer to that was presented in the form of a counter application in which it asserted that it had been justified in reversing the payments that it made because the applicant had allegedly overcharged it. The practical difficulty was that the first respondent was in winding up and the sixth and seventh respondents had at the time that the papers in the application were finalised not formed a view on whether there was any merit in either party's position. I considered therefore that it would be in the interests of justice if the applicant's alternative relief and the first respondent's counter application were adjourned. I was not prepared to decide an issue on which I had not heard argument from both parties. The consequences of that decision, as pointed out by Mr Harrison, is that I made no final determination of the counter application or the applicant's claim based upon the *condictio furtiva* and they are consequently not appealable.

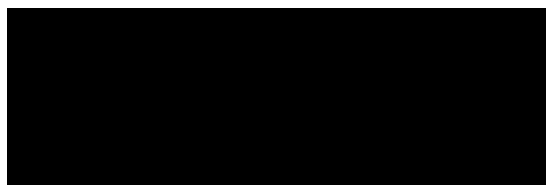
[10] As regards the sixth and seventh respondent's counter application, it appears to me that the principles enunciated by Cachalia JA in *Trustees, Estate Whitehead v Dumas and another*,⁴ deal exactly with the principles at play in this matter. I can

conceive of no other court holding otherwise. As such, as much as it may rankle the applicant, the sixth and seventh respondent's counter application had to succeed.

[11] After a thorough consideration of the grounds upon which leave to appeal is sought, I remain unpersuaded that there are reasonable prospects that another court would come to a different conclusion than the one to which I came, this being particularly so given the facts that I found to be established and given the increased threshold that applications for leave to appeal now face.

[12] I accordingly grant the following order:

The application for leave to appeal is refused with costs.



MOSSOP J

⁴ *Trustees, Estate Whitehead v Dumas and another* [2013] ZASCA 19; 2013 (3) SA 331 (SCA).

APPEARANCES

Counsel for the applicant : Mr D Ramdhani SC
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Umhlanga
Locally represented by:
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Date of Hearing : 28 July 2023

Date of Judgment : 28 July 2023