REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 38168/2019

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES/NO	
(2) OF INTEREST TO OTHER JUDGES: YES/NO	
(3) REVISED :	
.....	.....
DATE	SIGNATURE

In the matter between:

MAMULO TRADING AND PROJECTS Appellant

and

JOHANNESBURG ROAD AGENCY First Respondent

CITY OF JOHANNESBURG METROPOLITAN MUNICIPALITY Second Respondent

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JUDGMENT

SENYATSI J:

A: INTRODUCTION

[1] This is an application for leave to appeal against the order handed down by this Court on 15 November 2019, to the following effect:

> *"IT IS ORDERED THAT:*
>
> *(1) The application is struck off the roll;*
>
> *(2) Applicant is to pay costs on attorney and client scale*"

[2] At the hearing of the application, the Court was reminded that the application concerns two matters that is case no: 2019/3816 and 2019/38169.

[3] Both Counsel, Mr Langa and Mr Lesomo confirmed that the application for leave to appeal was in respect of the orders in both matters. The facts and the relief sought were the same although the matters were not consolidated into one.

[4] At the hearing of the arguments, I asked both Counsel to address this Court on whether or not the order striking the matter from the roll was a final judgment and whether such an order was appealable.

[5] The leave to appeal application in the matter raised several grounds totalling 22 in number. I will not deal with each ground as these averments are not reflected in my order handed down on 15 November 2019.

[6] Mr Lesomo submitted that although generally speaking the order striking the matter from the roll is not appealable, in the instant case, the Court should consider granting leave to appeal as it would be in the interest of justice to do so.

[7] Mr Lesomo furthermore submitted that the Court ought to have heard the matter as the relief sought was regarding the arbitration clause of the agreement between the parties. He contended that the agreement was not cancelled but terminated by the first Respondent. He furthermore argued that the order partially disposed of some of the definitive rights of the Applicant.

When he was invited to point out in the order where such definitive rights were dealt with, he could not do so.

B. BACKGROUND

[8] The Applicant brought an urgent application on 12 November 2019 for an order in the following terms:

(a) That the matter is urgent, thus dispensing with the normal court rules regarding service and filing of documents;

(b) That a dispute exists between the parties on whether or not the Respondent is entitled to terminate the agreement concluded by the parties on 27 June 2018;

(c) That the said dispute shall be dealt with in accordance with clause

17.1and 18 of the agreement concluded on 27 June 2018;

(d) That during the existence of the dispute referred to, the Respondent must continue to perform all its obligations under the agreement concluded on 27 June 2018 and that the other part of the agreement provision of hygiene and pest control, shall not be suspended;

(e) Costs of the suit.

[9] During the hearing of the applications, Counsel for the Respondents submitted that the matter was not urgent and that it had in fact been struck off from the roll on 31 October 2019 by Siwendu J on the grounds of lack of urgency.

[10] Counsel for the applicant, Mr Lesomo, was invited to demonstrate to court new facts rendering the matter urgent. Upon proper consideration of the papers and the submission by Mr Lesumo, no new facts could be established rendering the matter urgent.

[11] As a consequence, the matter was struck form the roll with costs on the attorney and client scale.

[12] The applications were heard together and the applicants were both represented by Mr Lesomo of Seokane Lesomo Incorporated.

C. ISSUE FOR DETERMINATION

[13] The issue for determination is whether an order striking off the matter from the roll is appealable.

D. THE LEGAL PRINCIPLES

[14] The principles on the question whether application for leave to appeal should be granted are regulated by Section 17 (1) of the Superior Courts Act 10 of 2013 ("the Act").

[15] The test is set out in Section 17(1) of the Act which provides 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) 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 against 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"*

[16] Prior to the promulgation of the Act, the test was whether there were reasonable prospects that another court may come to a different conclusion.

[17] In *Commissioner of Inland Revenue v Tuck 1989 (4) SA (T)* at 890, in applying the test prior to the promulgation of the Act, Eloff DJP states the following at page 890B:

> *"It seems to us that the point in issue is one which is of such a nature that there is an adequate prospect that another Court may come to a different conclusion."*

This test was applied in may subsequent cases.

[18] The Act has now ushered a new threshold in terms of which the bar for leave to appeal has been raised. In terms of Section 17(1), leave to appeal would only be granted under the circumstances set out in the section.

[19] The *Mont Chevaux Trust v Tina Goosen & 18 Others* case was followed with approval by DJP Ledwaba in *Acting National Director of Public Prosecutions & Others v Democratic Alliance (19577/09)[2016] ZAGPPHC* at para 25 where the following is 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 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 Cron Wright & 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".*

[20] *In casu* the order sought to be appealed against neither dispose of any issue at all nor is it final or definitive of the right of the parties. The order cannot therefore be appealed against.

[21] In *Zweni v Minister of Law and Order 1993 (1)All SA (A)* Harms JA, in dealing with principles to be applied to determine the applicability against a judgement, held as follows at paragraph [6]:

"*Leave is granted if there are reasonable prospects of success. So much trite. But, if the judgment or order sought to be appealed against does not dispose of all the issues between the parties the balance of convenience must, in addition, favour a piecemeal consideration of the case. In other words, the test is then whether the appeal if leave were given would lead to a just and reasonable prompt resolution of the real issue between the parties.*"

[22] It is also trite that decisions on preparatory or procedural character ought not to be appealable (See *Pretoria Garrison Institutes v Danish Variety Products (Pty) Ltd 1948 (1) SA 839 (A) at 848).*

[23] The emphasis on the consideration of whether to grant leave to appeal is now on whether an appeal will lead to expeditious and cost-effective determination of the main dispute between the parties and as such contribute to its final solution.

[24] It is important to note that our Courts have held and this is now trite that a judgment or order is a decision which, as a general principle, has three attributes, namely:

(a) the decision must be final in effect and not susceptible of alteration by the Court of first instance;
(b) it must be definitive of the rights of the parties
(c) it must have the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings (See *Marsay v Dilley 1992 (3) SA 944(A)962F).*

[25] In the instant as already stated, the order as it stands does not dispose of any issue in the main application. It does not venture into the merits of the matter at all. The order simply strikes the matter from the roll. It is therefore non-meritorious for Mr Lesomo to submit that the order in fact does dispose of some of the issues. He could not substantiate *ex facie* the order on the basis of his submission.

ABUSE OF COURT PROCESS AND COSTS DE BONIS PROPRIIS

[26] It was submitted by Mr Langa on behalf of the respondents that the applicants received a fair warning by Siwendu J when the matter was before her on 31st October 2019 about whether this matter was urgent.

[27] Mr Lesomo denied during the hearing of this application for leave to appeal that the urgency was dealt with by Siwendu J. He argued that the reason the application was struck from the roll was due to non-compliance with the practice manual owing to short notice given to the respondents.

[28] Mr Lesomo was confronted with the record of proceedings before Siwendu J page 14 lines 8, 14 and 23 and page 15 lines 1 and 2 of the record where the court clearly confronted him about the urgency. He had no satisfactory response to offer safe to state that Siwendu J dealt with the merits of the application.

[29] When the matter was before this court on 15 November 2019, Mr Lesomo was again asked to demonstrate that the matter was urgent and that there were new facts justifying the urgency of the matter. There were no such new facts on the papers before me then. It was on that basis that the matter was struck off the roll.

[30] During the hearing of the leave to appeal application, Mr Lesomo kept on insisting that this court erred by not hearing the merits of the main application.

[31] The merits of the main application have not been canvased and this is clear from the order striking the matter from the roll.

[32] Mr Lesomo, as an officer of this court, did not perform satisfactorily when asked whether Siwendu J canvased urgency. He denied an obvious fact that urgency was not canvassed when in fact the matter was struck off the roll by

Siwendu J on the grounds of lack of urgency. He attempted to mislead this court and as a consequence called upon himself a punitive cost order de *bonis propriis.* His conduct of this application leaves much to be desired as an officer of this Court.

It is not, justifiable that the Applicant must pay the legal costs out of own pocket. Mr Lesomo's conduct of the matter calls for censor by this court within an appropriate cost order against him.

[33] The Court did not err in striking off the matter as the application was for a simple declaratory order about an agreement.

[34] The Applicant can still approach this Court through a normal application to seek relief in terms of the notice of motion.

[35] Having considered the arguments by both parties, I am not persuaded that the order granted on the 15 November 2019 is appealable. The application must therefore fail.

[36] **ORDER**

The following order for leave to appeal is made:

(a) The application for leave to appeal is dismissed.

(b) Mr Lesomo of Seokane Lesomo Incorporated is ordered to pay the costs *de bonis propriis* on the scale as between attorney and client.

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SENYATSI J

Judge of the High Court of South Africa

Gauteng Local Division, Johannesburg

Date leave to appeal application heard: 6 February 2020

Date of Judgment: 11 February 2020

Appellants Counsel: Adv. Lesomo

Instructed by: Seokane Lesomo Inc

Respondents Counsel: Adv. S. Langa

Instructed by: Padi Incorporated Attorneys