REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: **45883/2018**

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED:

10 December 2020 Klulwenfell

In the matter between:

THABO SINDISA KWINANA	First applicant/defendant
THABO SINDISA KWINANA N.O.	Second applicant/defendant
ZOLISILE MTETELELI MAPIPA N.O.	Third applicant/defendant
and	
LULUMA SMUTS NGONYAMA	First respondent/plaintiff
NOKWAZI NOKWAZELELA NGONYAMA N.O.	Second respondent/plaintiff
KHANYA MALUNGELO NGONYAMA N.O.	Third respondent/plaintiff
QHAWE HLOMELO NGONYAMA N.O.	Fourth respondent/plaintiff

JUDGMENT ON LEAVE TO APPEAL

GRENFELL AJ

[1] INTRODUCTION

1.1. The applicants, being the unsuccessful applicants in a rescission application, seek to appeal the judgment refusing them rescission of the orders of Dosio AJ on 15 and 17 April 2019, wherein the following relief was granted:

1.1.1. An account for the debatement to the plaintiffs (respondents) in respect of the 6.5% of the Eyabantu Development Trust shareholding in Eyabantu Capital Consortium (Pty) Ltd;

1.1.2. That defendants (applicants) transfer to the plaintiffs (respondents) in their capacities as the trustees for the time being of the Khululekile Family Trust, the 6.5% of the Eyabantu Development Trust shareholding in the Eyabantu Capital Consortium (Pty) Ltd; and

1.1.3. Costs of suit.

1.2. The judgment dismissing the rescission application with costs was handed down on 19 June 2020, which judgment included an order for variation, and an order dismissing an urgent application to stay the execution of the default judgment and consolidation.

1.3. This application was heard by video conferencing in terms of the Consolidated Practice Directive dated 11 May 2020 of this division.

1.4. At the hearing of the application for leave to appeal, Mr Stockwell appeared for two intervening parties, being shareholders in the Eyabantu Capital Consortium (Pty) Ltd, and submitted that the leave to appeal application should be held over, pending the finalisation of a joinder application still to be heard in this matter and an application to consolidate the matter brought by the respondent's in terms of section 161 of the Companies Act of 2008.

1.5. Arising from a contempt of court application brought by the respondents in enforcing the orders granted by default, the applicants in that application brought a counter-application to stay the execution of the order of Dosio AJ, pending the finalisation of the application in which the applicants seek to be joined as interested parties to these proceedings, consolidating the proceedings under various case numbers and rescinding the two orders granted by Dosio AJ.

1.6. The counter-application for a stay of the Dosio AJ orders, was granted under case number 18790/2020 by Coetzee AJ on 20 November 2020. An application for leave to appeal that judgment is pending.

1.7. However this application for leave to appeal, was not expressly mentioned in the judgment of Coetzee AJ and accordingly the following issues fall to be determined:

1.7.1. Whether the application for leave to appeal should be delayed pending the determination of the joinder application;

1.7.2. Whether the applicants have reasonable prospects of success on appeal;

1.7.3. If so, the court to which leave to appeal should be granted.

[2] **THE APPLICATION TO STAY**

2.1. Mr Stockwell sought a stay of the application for leave to appeal on the basis that the two shareholders for which he appears, Eyabantu Consortium (Pty) Ltd and Eyabantu Capital (Pty) Ltd, seek leave to intervene in the matter and will then seek to rescind the order of Dosio AJ.

2.2. Mr Stockwell conceded that the application for leave to appeal was not expressly mentioned in the contempt application and was not precluded by the order of Coetzee AJ.

2.3. The respondents contended that the intervening parties were not parties to the action and that they had their own remedies in terms of rule 42 of the uniform rules of court and that the application should be determined, the respondents having driven the process to set the application down.

2.4. The respondents further contend that there is no direct and substantial interest of a company in its shareholders, otherwise in all litigation in which holders of shares in listed companies litigate over those shares, the company would have to be joined.

2.5. The argument was made on behalf of the respondents, that a company has no direct and substantial interest in who comprises its shareholders and that the

principle has been South African company law since the early 20th century. Mr Stockwell in response conceded that there were other shareholders, nine in total and that he only represented two of them.

2.6. I am of the view that it has not been demonstrated that the shareholders needed to be joined for purposes of the order sought before Dosio AJ, which sought to resolve a dispute between two shareholders and also an attorney and his client.

2.7. Accordingly, and mindful of the joinder application that is still to be argued, I decline to enrol the application to intervene in the application for leave to appeal.

[3] **THE TEST FOR LEAVE TO APPEAL**

3.1. It is a precondition to the granting of leave to appeal that the court is of the opinion, that either, the appeal would have a reasonable prospect of success or that there is some other compelling reason why the appeal should be heard.

3.2. The wording of section 17(1) of the Superior Courts Act 10 of 2013 provides:

> *"Leave to appeal may only be given where the judge or judges concerned are of the opinion that –*
>
> *(a)(i) The appeal would have reasonable prospects 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 appeal sought to be appealed does not dispose of all the issues of the case the appeal would lead to a just and prompt resolution of the real issues between the parties."

3.3. The wording of the rule was amended by virtue of the inclusion of the word *"would"* in section 17(1)(a)(i) thereof. As a precursor to the granting of leave to appeal, same should be seen as a more stringent requirement of reasonable prospects of success on appeal, as opposed to another court coming to a different conclusion. I now consider whether the applicants have reasonable prospects of success on appeal.

[4] **GROUNDS OF APPEAL**

4.1. The submissions made by Mr Combrink for the applicants, were focused on three facets, namely:

4.1.1. The leave to appeal order is temporarily moot;

4.1.2. No cause of action was made out in the particulars of claim upon which Dosio AJ granted default judgment; and

4.1.3. The replying affidavit should have been admitted in the rescission argument with the respondents being given an opportunity to file a supplementary affidavit.

4.2. I deal with these submissions in turn. The suggestion of temporary mootness in light of the particular procedural circumstances of this matter, is in my view a non-starter. Mootness by definition cannot be temporary. The submissions on mootness confuse the position of the existing parties to the action, with that of the parties seeking to intervene. The submission made that the application for leave to appeal be kept over until the joinder application is finalised, is procedurally flawed and will lead to inordinate delay.

4.3. It is foreseeable that the joinder application outcome will be appealed, which will result in the application for leave to appeal in this matter between these parties lingering in limbo. All this delay, at the behest of two parties who have not yet been joined in the action and may never be. I incline to the view that once the judgment had been handed down dismissing the rescission application, this court is functus officio, but for hearing an application for leave to appeal.

4.4. Both parties have an interest in finality and there is nothing sensible in thwarting proceedings until some undetermined date in the future.

4.5. In respect of the supplementary affidavit, the erroneous submission is made, that the court effectively disregarded the replying affidavit due to no condonation being sought, whereas the judgment declines to allow new matter to be raised in the replying affidavit which should have been contained in the founding affidavit.

4.6. It is unnecessary to decide the point in light of the opinion that I form on the third submission.

4.7. In respect of the point that no cause of action was made out against any of the applicants, in the particulars of claim, having regard to the date of registration of the plaintiff trust and the date of the alleged agreement as pleaded, I am persuaded that the point was sufficiently raised in the founding affidavit for rescission to found the argument.

4.8. I am also persuaded that there are reasonable prospects that another court could come to the conclusion that the pleadings lack averments that the trustees acted jointly and that the plaintiff trust could not have been the intended shareholder in the company by virtue of its date of incorporation.

4.9. If these contentions are upheld, then there was reasonable prospects of arguing on appeal that Dosio AJ erroneously granted default judgment within the meaning of rule 42(1)(a).

4.10. Although the submissions by Mr Combrink relating to good cause were confined to the defence and not the default in filing a plea, a positive finding for the applicants on the defence may be sufficient for rescission to be granted on appeal.

[5] CONCLUSION

5.1. The parties were in disagreement as to which court should hear the appeal. Although the rescission requirements are not in dispute, the matter is of great importance to the parties, and procedurally intricate new principles arise as to the necessity for joinder of parties and consolidation of actions.

5.2. In these circumstances it is fitting that the Supreme Court of Appeal determine the disputes between the parties.

[6] **ORDER**

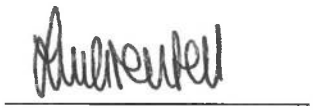
I grant the following order:

1 The application for leave to intervene is not enrolled;

2 The costs of the intervention are reserved for the court hearing the joinder application;

3 Leave to appeal the judgment dated 19 June 2020 is granted to the Supreme Court of Appeal;

4 Costs of the application for leave to appeal are to be costs in the appeal.



Grenfell AJ

Appearances

For intervening parties:	Adv R Stockwell SC
Instructed by:	Erasmus de Klerk Inc.
For the applicants:	Adv Combrink
Instructed by:	Erasmus de Klerk Inc.

For the respondents: Adv L Morison SC

Instructed by: Knowles Husain Lindsay Inc.

Date of hearing : 2 December 2020 by video-conference

Date of judgment: 10 December 2020 - deemed date by email and uploading onto CaseLines