




IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

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

Date: 15/11/2022 **Signature:** 

Case No. 27833/2021

In the matter between:

SIMELANE, DAVID NDABENHLE

Applicant

and

ROSEVEARE, SHAUN

1st Respondent

ROSEVEARE, SHAUN BRADLEY N.O.

2nd Respondent

ROSEVEARE, RYAN EDGAR DENNIS N.O.

3rd Respondent

WHITTAKER, CHRISTINE MARY N.O.

4th Respondent

MUNRO, CRAIG

5th Respondent

SHAULIS, STEVEN PATRICK

6th Respondent

NATIONAL AIRWAYS CORPORATION (PTY) LTD

7th Respondent

(First to Seventh applicants in the main application)

and

ULTIMATE HELI (PTY) LIMITED

8th Respondent

ULTIMATE AIRWAYS (PTY) LIMITED

9th Respondent

ULTIMATE HELIPORT (PTY) LIMITED

10th Respondent

(Second to fourth respondents in the main application)

JUDGMENT LEAVE TO APPEAL

MAHOMED AJ

INTRODUCTION

1. The applicant applied for leave to appeal a dismissal of an application for a postponement, which I heard on 5th September 2022.¹ On 8 September 2022, the applicant filed a notice for leave to appeal,² wherein he reserved his right to supplement his grounds of appeal upon receipt of my reasons. The respondents (the applicants in the main application) filed their heads of argument.³
2. At the hearing of this application the applicant's counsel Advocate F Saint, abandoned the extensive grounds of appeal in his notice and accepted the reasons for my judgment.⁴
3. Mr Saint, however, raised the point that the order I granted is irregular in that it does not inform the applicant of the values he would be paid

¹ Caselines 0001-9 to 11

² Caselines 24-1

³ Caselines 14-58

⁴ Caselines 0001-12

for the shares in each of the entities. He argued there must be some reciprocity.

BACKGROUND

4. Following on my refusal of the application for a postponement, Miltz SC applied for the striking off the applicant's (the first respondent in the main application) defense in the main application.
5. I struck out the defense for the reasons set out in my judgment⁵ and proceeded to hear the main application by default.
6. Miltz SC made submissions on a breach of contract, on the evidence to prove prejudicial conduct in terms of s163 of the Companies Act 71 of 2008 and he referenced the "deemed offer" provision in the agreements concluded between the parties, for the order sought.
7. Having heard counsel on the formula applied for the assessment of the value of the shares in each of the three entities, and the values as assessed, I granted the order as appeared on file and in the notice of motion.

⁵ See note 4 above

8. During the hearing of the application for a postponement, Mr Saint argued that the assessed values of the shares in the entities were not fair value. He submitted they were undervalued but failed to proffer any values which in the applicant's view would be fair.
9. The applicant's only defense was that the shares were undervalued. Obviously, he knew what was tendered for him to dispute the assessed values and his counsel did indeed refer to the values. To my mind there is no uncertainty as to the substance of the judgment.
10. Mr Saint referred the court to the judgment in **ADMINISTRATOR OF CAPE OF GOOD HOPE AND ANOTHER v NTSHWAQELA AND OTHER**⁶, where the court stated,

"It may be said that the order must undoubtedly be read as part of the entire judgment and not as a separate document, but the court's directions must be found in the order and not elsewhere. If the meaning of an order is clear and unambiguous, it is decisive, and cannot be restricted or extended by anything else stated in the judgment."

11. Prayer 1 of the order provides for delivery of identified share certificates, "against a tender for payment of his shares".

⁶ (165/89) [1989] ZASCA 167 paragraph 29

12. As I stated earlier the share price was the only dispute between the parties and could only be disputed with knowledge of the assessed values.
13. The issue raised by Mr Saint is not a competent ground for an appeal as contemplated in s 17 (1) of the Superior Courts Act 10 of 2013. If unclear, the applicant can resort to the use of the Uniform Rules, if still necessary.
14. Accordingly, leave to appeal is refused.

COSTS

15. The applicant raised twenty separate grounds of appeal, albeit some were repeated.
16. The notice and grounds were filed “together with” a request for reasons. It follows that the applicant, did not have the court’s reasons when he raised his grounds of appeal. However, the applicant knew he had no prospects of success in the main application, that point was raised on several occasions throughout the hearing of the matter.

17. The respondents in response to the notice of appeal, filed their heads of argument.⁷

18. In **RABINOWITZ v VAN GRAAN**,⁸ the court on the issue of costs referenced the words of Fleming DJP,

“an award of costs is principally a discretion which must be judicially exercised in the sense that it may be guided by established and known considerations. The award of costs rests upon the object of reimbursing a person for costs to which he was wrongfully put.”

19. The applicant abandoned all its grounds of appeal, it clearly had no basis to appeal the judgment and forced the respondent into incurring further legal costs for their argument.

20. In **PUBLIC PROTECTOR V SOUTH AFRICAN RESERVE BANK**,⁹ the court referred to the principles espoused by Innes CJ,

“costs on an attorney client scale are awarded when a court wishes to mark its disapproval of the conduct of the litigant. Attorney client costs have been awarded for fraudulent, dishonest or mala fides (bad faith)

⁷ See footnote 3 above.

⁸ 2013 (5) SA 315 (GSJ) par 44 in 1926 AD 467 at 488

⁹ [2019] SACC 29 at p 82 para 223

*conduct, vexatious conduct, and conduct that amounts to an abuse of the process of court.*¹⁰

21. The applicants conduct in filing a notice of appeal on extensive grounds without reasons having been procured was a risk. He obviously had no reasons for an application of this nature. The point raised by Mr Saint is not a matter for an appeal court as I mentioned earlier.
22. I am of the view that punitive costs are appropriate.

I make the following order:

1. The application for leave is dismissed.
2. The applicant shall pay the costs on an attorney client scale, including the costs of two counsel.



MAHOMED AJ
Acting Judge of the High Court

¹⁰ See above footnote and references at p83 footnotes 175-177

This judgment was prepared and authored by Acting Judge Mahomed. It is handed down electronically by circulation to the parties or their legal representatives by email and by uploading it to the electronic file of this matter on Caselines. The date for hand-down is deemed to be 15 November 2022.

Date of hearing: 27 October 2022

Date of Judgment: 15 November 2022

Appearances

For applicants: Advocate F Saint

Instructed by: Mayet Vittee Inc

Email: mmayet@mvattorneys.co.za

For First Respondent: Miltz SC

Instructed by: G Cohen

Email: gcohenattorney@gmail.com