REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 53311/2013

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

24/06/2022 **(sgnd).....**

DATE Matshitse CK

In the matter between:

DANCESPORT SOUTH AFRICA
(REGISTRATION NUMBER: 2020/561063/07 Applicant

and

SOUTH AFRICAN DANC FOUNDATION
(REGISTRATION NUMBER: 1998/01900-08) 1st Respondent
THABO PHIRI 2nd Respondent
SOUTH AFRICAN SPORT CONFEDERATION
AND OLYYMPIC COMMITTEE 3rd Respondent
COMPANIES AND INTELLECTUAL PROPERTY
COMMISSION 4th Respondent

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email. The date and time for hand-down is deemed to be 10h00 on 24th June 2022

LEAVE TO APPEAL JUDGMENT

MATSHITSE AJ

[1] The applicant has applied for leave to appeal to a full Court of this division alternatively, the Supreme Court of Appeal, against the judgement I delivered on 25 January 2022.

[2] The applicant seeks leave to appeal on several grounds as stated in its application for leave to appeal. Only first respondent is opposing the application. Both the applicant and first respondent filed detailed heads of arguments.

[3] Counsel for the applicant addressed the court on the salient points raised in the application. Among those salient points was the argument that first respondent had abandoned the name Dancesport South Africa rendering it to be deregistered by fourth respondent and it was available to anyone to can use it including applicant. That the word "dancesport" is was a generic word used to describe competitive ballroom dance. That further that first respondent is indeed protected from the use of its trademark "Dancesport Champion" in that sequence, however it cannot be protected from the use of the word dancesport.

[4] The above points were opposed by counsel for the first respondent on several grounds, among others that "it is law that a company name is not a trademark and no right to use such name as a trademark can be claimed unless such trademark has been registered, in which fact the first respondent has registered the said disputed name of Dancesport. Furthermore, submissions were made that there are no prospects that another court would have come to a different conclusion.

[5] The test for granting an application for leave to appeal is whether there are reasonable prospects that another court would have come to a different conclusion. Section 17 of the Superior Courts Act 10 of 2013 ("the Act") states that leave to appeal may only be granted where the judge or judges are of the opinion that:

(a) (i) the appeal would have a reasonable prospect of success; or

(ii) for some other compelling reason it should be heard, including conflicting judgements on the matter under consideration;

(b) the decision sought does not fall within the ambit of Section 16(2)(a) of the Act; 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] The test laid down in Section 17 of the Act is now a subjective one and no longer an objective test. There must be a measure of certainty that another court will differ from the court whose judgment is sought to be appealed against.[1] "It is clear that the threshold for granting leave to appeal against a judgement of the High Court has been raised in the new Act. The former 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 Cronwright & 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 judgement is sort to be appealed against".[2]

[7] The above was emphasised in the case of Fair Trade Independent Tobacco Association v President of South Africa and another[3] that "As such, in considering the application for leave, it is crucial for this court remain cognizant of the higher threshold

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[1] The Mont Cheveaux Trust (IT2012/28) v Tina Goosen & 18 Others (unreported judgment deliver on 3 November 2014)

[2] At par 6 of Mont Chevauz case

[3] [2020] ZAGPPHC 311 9JUDGEMENT DELIVERED ON THE 24 July 2020)

that needs to be met before leave to appeal may be granted. There must exist more than just a mere possibility that another court, the SCA in this instance, will not might, find differently on both facts and the law. It is against this background that we consider the most pivotal grounds of appeal".

[8] I had dealt in depth with all the issues raised in the application for leave to appeal in my judgement. After listening to submissions by both counsel for the applicant and counsel for the respondents and after reading the application for leave to appeal, and both parties' heads of arguments, I am of the view that there are no prospects that another court would come to a different conclusion.

Costs

[9] First respondent is seeking that applicant be ordered to pay the cost on punitive scale. Whereas the applicant submitted that the application be granted and the costs should be the cost in the cause.

[10] In support of its submission that applicant pay punitive costs, on attorney and own client scale, first respondent submitted that applicant have no prospect of success and allowing such an appeal would only waste time, further costs and clog up an already overloaded appeal court.

[11] She further submitted that the applicant's malicious attitude is once again reflected in bringing this frivolous application and that the court should dismiss the application for leave to appeal with costs on punitive scale in order to deter the applicant from proceeding not only to frustrate the first respondent's peaceful exercising of its rights, but also not to burden the court any further with unsubstantiated argument.

[12] The basic principles governing granting of cost orders in civil litigation is that the judicial officer has the discretion in granting same, but that costs should generally follow the result[4]. It is, however, expected that the court will exercise this discretion with certain well-established principles[5].

[13] The most important of these principles is that where a party has been substantially successful in bringing or defending a claim, that party is generally entitled to have a cost order made in its favour against the other party who was not successful[6]. In order to establish who is to be regarded as the successful party, the court must look at the substance of the judgment and not merely its form.

[14] An award of attorney and client costs is not lightly granted by the court, the court leans against awarding attorney and client costs, and will grant such costs on "rare" occasion.[7] An award of attorney and client costs is granted by reason of special considerations arising either from the circumstances which gave rise to the action, or from the conduct of the losing party[8].

[15] The question is, did the conduct or circumstances of the applicant and or its attorneys of record raise those special considerations that warrants that respondent be ordered to pay costs on attorney and client scale? The Constitutional Court has said that the granting of punitive costs should "never…be an easy option"[9].

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[4] 47 Ferreira v Levin, Vryenhoek v Powell 1996 (2) SA 621 (CC) at 624. See also President of the Republic of South Africa & Others v Gauteng Lions Rugby Union & Another 2002 (2) SA 64 (CC), 2002 (1) BCLR 1 (CC), [2001] ZACC 5 at para 15

[5] See A Cilliers The Law of Costs (2006) at § 14.04, citing Neugebauer & Co Ltd v Hermann 1923 AD 564, 575; Penny v Walker 936 AD 241, 260; Protea Assurance Co Ltd v Matinise 1978 (1) SA 963, 976 (a); Kilian v Geregsbode, Uitenhage 1980 (1) SA 808, 815-816 (a).

[6] Skotnes v SA Library 1997 (2) SA 770 (SCA).

[7] Ebrahimv Excelsior Shopfitters and Furniture's (Pty) Ltd (2) 1946 TPD 226; Nel v Davis SC NO and another [2017] JOL 37849 (GP) par 25-27

[8] Pienaar v Boland Bank and Another [1986] 1 All SA 409(O)

[9] Helen Suzman Foundation v President of the Republic of South Africa and Others 2015(2) SA 1 (CC) par 36

[16] In Van Wyk v Millington[10] it was pointed out that the courts reluctance to award attorney and client costs against a party is based on the right of every person to bring his complaints or his alleged wrong before the court to get a decision, and he should not be punished if he is misguided in bringing a hopeless case the court.

[17] Costs of attorney client was refused[11] where a trial was conducted with certain degree of acrimony, on one occasion, exaggerated language was used, like in the current application, where parties had exchanged correspondence between them and their conduct between them was not a very good one, however the conduct of the case was not improper.

[18] Therefore the court is not satisfied that there is any special consideration arising either from any of the parties in this matter in bringing or opposing this application and as such it will not be appropriate to order that any of the parties should pay the cost of this application on an attorney and client scale.

[19] Accordingly, the following order is granted:

The application for leave to appeal is dismissed with costs.

MATSHITSE AJ

Counsel for the Applicant:	Adv L A Maisela
Attorney for the Applicant:	Mahapa attorneys
Counsel for 1st Respondent:	Adv M De Meyer
Attorney for 1st Respondent:	F Van Wyk Attorneys
Date of hearing:	10 June 2022
Date of judgement:	24 June 2022

[10] 1948(1) SA 1205 (C)
[11] Plaaslike Boeredienste (Edms) Bpk v Chemfos Bpk 1986 (a) SA 819 (A)