IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

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

18 JULY 2022
DATE SIGNATURE

CASE NO: 22428/2019
DATE: 01/02/2022

In the matter between:

ZYLEC INVESTMENTS (PTY) LTD Applicant

and

NATIONAL STADIUM SOUTH AFRICA First Respondent

SAIL RIGHTS COMMERCIALISATION (PTY) LTD Second Respondent

In re:

NATIONAL STADIUM SOUTH AFRICA First Plaintiff

SAIL RIGHTS COMMERCIALISATION (PTY) LTD Second Plaintiff

and

ZYLEC INVESTMENTS (PTY) LTD Defendant

JUDGMENT

PHOOKO AJ:

INTRODUCTION

[1] This is an application for leave to appeal to the Full Bench of this Court and/or to the Supreme Court of Appeal in terms of section 17(1)(a)(i) of the Superior Courts Act 10 of 2013. According to the Applicant, the basis for this application is *inter alia* the Court's *a quo* failure to consider the Applicant's supplementary written argument, and the failure to provide reasons when granting judgment on 03 February 2022.

THE PARTIES

[2] The Applicant is Zylec Investments (Pty) Ltd (The Defendant), a private company with limited liability, registered, and incorporated in terms of the company laws of the Republic of South Africa.

[3] The First Respondent is National Stadium South Africa (Pty) Ltd, a private company with limited liability, registered, and incorporated in terms of the company laws of the Republic of South Africa. The First Plaintiff is the proprietor of the historic venue situated in Nasrec, which hosted South Africa's World Cup opening soccer match against Mexico in 2010.

[4] The Second Respondent is Sail Rights Commercialisation (Pty) Ltd, a private company with limited liability duly registered and incorporated in terms of the company laws of the Republic of South Africa. The Second Respondent is an

agent of the First Respondent and the holder of all commercial rights such as advertising, naming rights of the stadium, and leasing of suits for generating income. As an agent of the First Respondent, the duties of the Second Respondent include invoicing and collecting rent from lessees such as the Defendant.

THE ISSUE

[5] The issue to be determined is whether there are reasonable prospects that leave to appeal, if granted, will succeed?

FACTS

[6] The facts of this case have been comprehensively discussed in my reasons provided to the parties on 01 March 2021. I, therefore, need not repeat them here save to provide a summary to give context.

[7] In October 2013, the First Defendant concluded a written agreement with the Appellant for a period of 3 years starting from 24 October 2013 until 22 October 2016.

[8] The agreement was amended via two addendums that *inter alia* introduced interest payable on default (2%), and extended the agreement from 23 October 2016 until 22 October 2019. Counsel for the Applicant did not dispute the amendments.

[9] In terms of the agreement, the First Respondent let Suit to the Applicant that was utilised for concerts, soccer, and rugby matches. In return, the Applicant

was required to pay annual rent and, a general service levy, including a once-off payment for furniture. The annual rent and levies were payable in full by no later than 01 October of each year unless the parties agreed and decided otherwise. The agreement authorised the Respondents to recover legal fees, on an attorney and own client scale, incurred to recover outstanding rent or general service levies from the Applicant.

[10] The Applicant defaulted on payment of rent. Consequently, the Respondents successfully instituted legal action to recover rent from the Applicant.

[11] Aggrieved by the decision of the court of the first instance, the Applicant now seeks leave to appeal to the Full Bench of this Court or the Supreme Court of Appeal.

APPLICABLE LAW

[12] It is now settled in our law that the threshold for the granting of leave to appeal has been raised in that leave may now only be granted if there is a reasonable prospect that the appeal will succeed.[1] The possibility of another court holding a different view no longer forms part of the test whether or not to grant leave to appeal.[2]

[13] It was correctly stated in *S v Smith*[3] that "… "leave to appeal should be granted only when there is 'a sound, rational basis for the conclusion that there are prospects of success on appeal'.

[1] See section 17(1)(a)(i) of the Superior Courts Act 10 of 2013, and *The Mont Chevaux Trust v Tina*
[2] Ibid at para 6.
[3] 2011 (1) SACR 567 (SCA) para 7.

[14] This is the yardstick for evaluating the submissions of the parties in ascertaining whether the evidence and/or submissions before this court indicate that there is a reasonable prospect that the appeal if granted, will succeed. I now turn to consider the submissions of the parties.

APPLICANT'S SUBMISSIONS

[15] Counsel for the Applicant argued that post the hearing on 01 February 2022, the Applicant was allowed to submit the final written heads of argument until 04 February 2022 "which would be supplementary to the argument of the predecessor of its counsel".[4] According to counsel, "this may need to be checked on record".[5]

[16] The Applicant further submitted that the Respondents delivered their argument on 2 February 2022 and that judgment was granted without reasons in their favour on 03 March 2022. According to the Applicant, the date of granting the judgment was before the due date for the delivery of the supplementary argument of the Applicant. To bolster its case, the Applicant referred this Court to the matter between *Morudi v NC Housing Services and Development Co Limited*[6] which dealt with a situation where the affected parties were not given an audience. There the Constitutional Court ruled that the High Court had committed a procedural irregularity. Consequently, the Applicant argued that there is a reasonable prospect that a court of appeal will set aside the judgment for failure to consider the Applicant's final argument.

[4] Appellant's head of arguments at para 3.1.
[5] Ibid.
[6] BCLR 261 (CC) at 33.

[17] In addition, the Applicant contended that the judgment of 03 February 2022 was granted without reasons. Counsel relied on the case of *Mphahlele v First National Bank of SA Ltd*[7] which recognizes that there is no express law that requires the judges to provide reasons for their decisions but that the rule of law requires them to do so for *inter alia* appeal processes. According to the Applicant, the reasons provided after the judgment "do not suffice".[8]

[18] The Applicant further argued that reasons for judgment could be requested in terms of Rule 49(1) of the Uniform Rules of the Court. To this end, the Applicant argued that the court did not provide a platform for requesting reasons when it issued its judgment on 03 February 2022.

[19] The Applicant denied the correctness of the demand in that it was *inter alia* not sent to the address stipulated in the agreement, and that there was no compliance with the required 7 days' notice for correcting the default as required by the agreement.

[20] The Applicant argued that in so far as the quantum is concerned, the Respondents relied on an increase as per the CPI even though there was no qualified expert to present such evidence. Consequently, the Applicant submitted that the Respondents failed to prove the quantum and therefore the court ought to have dismissed the claim.

[21] About the novation defence, the Applicant argued that they did not abandon the defence but merely did not persist with it.

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[7] [1999] JOL 4508 (CC) / 1999 (3) BCLR 253 (CC).
[8] Applicant's head of arguments at para 4.2.

[22] Furthermore, the Applicant argued that the fact that no witness was called and/or that the Respondent's witnesses were not cross examined, did not entail that the Respondent's case was automatically proven on a balance of probabilities.

[23] Ultimately the Applicant argued that the costs should be costs in the appeal.

RESPONDENTS' SUBMISSIONS

[24] Counsel for the Respondents argued that it was factually incorrect for the Applicant to contend that they were not given an opportunity to submit a written heads of argument. Counsel argued that the Applicant had indicated in court that he will submit written argument but failed to do so.

[25] The Respondents also submitted that a court was not obliged to furnish reasons if none were provided and that this argument has become moot as the reasons were provided when requested.

[26] The Respondents contended that the demand was made to the required *domicilium* address as chosen by the Applicant on 5 November 2018 and thereafter to the Applicant's attorneys.

[27] The Respondents also argued that the legal principle regarding *mora* was stated in the court's judgment and that the Applicant has not provided any alternative interpretation. As a result, the Respondents argued that "this court cannot say that another court will come to a different conclusion".[9]

[9] Respondent's heads of argument at para 10.

[28] The Respondents argued that even if the court were to be wrong on the application of the *mora* principle, leave to appeal should still be refused on the basis that the receipt of the demand was not challenged after receiving summons and that the Respondents did not cancel the agreement, but sought to recover outstanding rental through clause 28.4 of the agreement among others.

[29] The Respondents further contended that they had discovered the CPI as published by Statistics South Africa and the issue of an expert was not raised. Further, the Respondents argued that the second addendum agreement provides a certificate of balance "which constitute prima facie proof of the contents".[10]

[30] Regarding the novation of the agreement, the Respondents argued that counsel for the Applicant expressly abandoned the defence at the start of the oral hearing and therefore cannot change his stance when the case is finalized.

EVALUATION OF EVIDENCE

[31] With regards to the non-consideration of the Applicant's "supplementary" written argument originating from the predecessor of its counsel, it is for the first time in this application that the word "supplementary" is used. Counsel for the Applicant undertook to file drafted heads of his predecessor but failed to do so. His closing arguments only related to the aspect of costs. There were no submissions on the merits. It is therefore astonishing that counsel, all of a sudden, is now referring to the "supplementary" argument.

[10] Ibid at para 12.

[32] In the court *a quo*, the former Applicant's counsel submitted that the written arguments were "drafted" by his predecessor. It was through the leave of that court that he was allowed to submit a written argument, prepared by his predecessor, post the hearing. This entails that the arguments were ready for submission. The court further asked counsel whether he was distancing himself from the written argument of his predecessor. He answered in the negative. It remains unclear as to why arguments that were already "drafted" during the hearing and the court had agreed to their submission remained not submitted. The Court did not at any stage give the Applicant a deadline of 04 February 2022. Counsel's arguments were ready and only required to be submitted. Regrettably, Counsel for the Applicant states that "this may need to be checked on record". Surprisingly, counsel who became involved only in the execution of the appeal did not first seek the record to familiarise himself with the proceedings before the court *a quo* before raising arguments that he is not even sure about.

[33] Counsel knew that his heads were not submitted and had a duty towards this court to submit them immediately given the fact that they were already "drafted".

[34] In my view, the Applicant's reliance on the matter between *Morudi v NC Housing Services and Development Co Limited* is misplaced. That case concerned affected parties that were not given an audience at all.[11] It is distinguishable from the present one in that the Applicant was given an audience to present its case through its counsel. It is only the heads that were

[11] at para 16.

not considered. In my view, the failure to hear written argument "is not necessarily an irregularity".[12] At no stage did counsel indicate that he sought to supplement the heads "drafted" by his predecessor.

[35] Concerning a failure to provide reasons, the Applicant correctly referred this Court to *Mphahlele v First National Bank of SA Ltd* and noted that there is no express constitutional provision that requires judges to provide reasons. But the rule of law requires reasons to be furnished to promote *inter alia* transparency and enable a losing party to decide whether or not to appeal. However, this case does not assist the Applicant's case if one reads the judgment further. The court in *Mphahlele v First National Bank of SA Ltd*[13] also stated that:

> "…*It may well be, too, that where a decision is subject to appeal it would be a violation of the constitutional right of access to courts if reasons for such a decision were to be withheld by a judicial officer".*

[36] In my view, the above paragraph does not apply in instances where an adverse decision has been made and the affected party does not ask for the reasons for the judgment but launches an application for leave to appeal without reasons. It cannot be said that the court withheld the reasons when they were not asked. In *Strategic Liquor Services v Mvumi and Others*[14] the Constitutional Court said:

> *"…the failure by Nel AJ to furnish his reasons, when requested for the appeal process, cuts right across the employer's right of*

[12] *Brian Kahn Inc v Samsudin* 2012 3 SA 310 (GSJ) at para 6.
[13] Para 12.
[14] [2009] 9 BLLR 847 (CC) at para 18.

access to courts" (emphasis added[1]).

[37] The Applicant did not request any reasons in this case and therefore could not contend that the Court withheld its reasons. On the contrary, the reasons were given within one-month post the granting of the judgment.

[38] About the novation defence, counsel for the Applicant argues that this was not abandoned. However, at the commencement of the oral hearing, the erstwhile counsel for the Applicant clearly stated that he does not persist with the novation defence and that he was not going to make any legal arguments to that effect. It appears that counsel for the Applicant has now changed that position. At the end of the hearing before this Court, counsel for the Applicant indicated that he was again no longer "persisting" with the novation defence.

[39] With regard to the demand, the Applicant has overlooked this issue as the evidence was led in that the demand was sent to the elected Applicant's physical and email addresses. I also dealt with the subject of the demand in my judgment.[15] The Applicant has unfortunately not provided any basis to fault the judgment in so far as it deals with the demand.

[40] Further, the Respondent correctly submitted that the breach clauses were not triggered because the Respondent opted to recover the overdue rent in terms of clause 28.4 of the agreement which provides for the recovery of outstanding rent.

[41] Concerning the expert, the Respondents' witnesses eloquently explained to this

[15] See judgment at paras 13, 24,

Court how the calculations were done.[16] The Applicant did not challenge this and/or raise any expert-related objections about the CPI. In my view, this is where the Applicant had an opportunity to challenge this evidence on the basis that an expert did not lead it.

[42] Having carefully considered the Applicant's, First and Second Respondent's written and oral submissions, I do not think that there is a reasonable prospect that leave to appeal, if granted, will succeed.

COSTS

[43] The Respondents have incurred costs in defending this application. I do not see any reason as to why they should be out of pocket for having successfully defended the application for leave to appeal.

[44] In my view, they are entitled to costs as per clause 28.4 of the agreement provides that in the event of breach by the Defendant "…the Lessor's rights under the Agreement or to recover such outstanding monies, the Lessee shall pay to the Lessor such collection charges and all or any legal and other costs, reasonably incurred on attorney and own client scale….". This is a clear-cut contractual term that needs to be adhered to.

ORDER

[45] I, therefore, make the order as follows:

[16] Ibid at para 21.

I. The application for leave to appeal is dismissed with costs;

II. The Applicant is to pay the costs of this application on the scale as between attorney and own client.

M R PHOOKO AJ

ACTING JUDGE OF THE HIGH COURT, GAUTENG DIVISION, PRETORIA

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/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 18 July 2022.

APPEARANCES:

Attorney for the Applicant: Mr Q OLIVIER

Olivier Attorneys

Counsel for the Defendants:	ADV HP WESSELLS
Instructed by:	Van Der Merwe & Associates
Date of hearing:	06 May 2022
Date of judgment:	18 July 2022