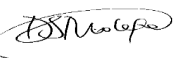




**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

Case No: 17958/22

(1) REPORTABLE: YES / NO (2) OF INTEREST TO OTHERS JUDGES: YES / NO (3) REVISED
 <div style="display: flex; justify-content: space-between; margin-top: 10px;"> SIGNATURE <u>10 AUGUST 2022</u> DATE </div>

In the matter between:

FLM SA (PTY) LTD

FIRST APPLICANT

BOXER SUPERSTORES (PTY) LTD

SECOND APPLICANT

JACO KRUGER

THIRD APPLICANT

THE ATRIUM BISTRO (PTY) LTD

FOURTH APPLICANT

LIVINIA ZEST CC

FIFTH APPLICANT

VARSITY BAR (PTY) LTD

SIXTH APPLICANT

and

THE GAUTENG PROVINCIAL LIQUOR BOARD

FIRST RESPONDENT

THOBILE NOKULUNGA MAGERMAN

SECOND RESPONDENT

(IN HER CAPACITY AS ACTING CHAIRPERSON OF THE
GAUTENG PROVINCIAL LIQUOR BOARD)

RAYMOND MARTIN

THIRD RESPONDENT

JUDGMENT: APPLICATION FOR LEAVE TO APPEAL

MOLEFE J

[1] The applicants seek leave to appeal the whole judgment and order of this court granted on 14 April 2022, alternatively reasons for the order/judgment handed down on 30 May 2022. Leave is sought to appeal to the Full Court of this Division on the grounds embodied in the notice of the application for leave to appeal.

[2] This application for leave to appeal is mainly based on the approach that I adopted in reaching a decision to dismiss the applicants' urgent application for the alleged contempt of court by the first respondent. This being an application for leave to appeal, I am not required at this stage to justify my judgment or offer an interpretation thereof, but only to consider whether there is substance in the arguments advanced by the applicants that would justify granting leave to appeal.

[3] Leave to appeal is sought in terms of section 17(1)(a) of the Superior Courts Act.¹ The applicants rely on a number of grounds which I will refer to later. The applicants submitted that a case has been made out for leave to be granted on the basis of either the requirement of a reasonable prospect of success or some other compelling reasons.

[4] Section 17(1)(a) of the Superior Courts Act provides that leave to appeal may only be granted where the Judge or Judges concerned are of the opinion that —

¹ 10 of 2013.

- ‘(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.’

[5] As to the section 17(1)(a)(i) test, in *The Mount Chevaux Trust (IT 2012/28) v Tina Goosen and 18 Others* the Land Claims Court per Bertelsmann J outlined how the Superior Courts Act had raised the bar for granting leave to appeal —

‘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 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 and 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.’²

This was confirmed in *Acting National Director of Public Prosecutions and Others v Democratic Alliance; In re: Democratic Alliance v Acting National Director of Prosecutions and Others (Society for the Protection of our Constitution as amicus curiae)*.³

[6] As such, in considering the leave to appeal this court has to remain cognisant of the bar that has been raised significantly, and the higher threshold that needs to be met before leave to appeal may be granted.

[7] The applicants’ grounds of appeal apart from several alleged misdirection by the court as set out in the application for leave to appeal is further that the only admissible and credible evidence in the contempt of court application is contained in the applicants’ founding affidavit, and that the court erred in not adjudicating the application only on the applicants’ evidence which allegedly constituted a complete cause of action, and instead the court dismissed the application with costs. This

² *The Mount Chevaux Trust (IT 2012/28) v Tina Goosen and 18 Others* 2014 JDR 2325 (LCC) at para 6.

³ *Acting National Director of Public Prosecutions and Others v Democratic Alliance; In re: Democratic Alliance v Acting National Director of Prosecutions and Others (Society for the Protection of our Constitution as amicus curiae)* [2016] JOL 36123 (GP) at para 25.

allegation is without merit. The urgent contempt of court application was opposed and the respondents filed their answering affidavit to which the applicants replied.

[8] The applicants' other ground of the application for leave to appeal is based on the costs order granted against the applicants. Counsel for the applicants argued that the costs order should not have been made against the applicants as they correctly brought the contempt application against the respondents. Again, there is no merit in the argument underpinning this ground. It is a basic rule of law that all costs, unless otherwise enacted, are in the discretion of the Judge. His discretion must be judicially exercised, but it cannot be challenged, taken alone and apart from the main order without his permission.⁴ Even the general rule that costs follow the event is subject to the overriding principle that the court has a judicial discretion in awarding costs. I am not persuaded that another court will find that this court erred in ruling on costs as it did.

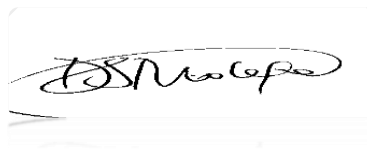
[9] In my view, the applicants have come short on both legs of the section 17(1)(a) inquiry. The elements of contempt of court were not established and there was no necessity for wilfulness and *mala fides* to be presumed against the respondents. There is nothing of substance raised by the applicants other than rehashing the arguments that were rejected by this court in the contempt of court application. There is nothing of such compelling importance in the judgment granted by this court to justify the conclusion that there is a compelling reason to grant leave to appeal.

ORDER

[10] I therefore make the following order:

1. The application for leave to appeal is dismissed with costs.

⁴ *Kruger Bros. and Wasserman v Ruskin* 1918 AD 63 at 69.

A rectangular box containing a handwritten signature in black ink. The signature is cursive and appears to read 'DS Molefe'. Below the box is a solid black horizontal line.

DS MOLEFE
JUDGE OF THE HIGH COURT
GAUTENG DIVISION OF THE HIGH COURT, 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 be 10 August 2022.

APPEARANCES

Counsel for the Applicants:

ADV. M A BESTER

Instructed by:

MARIUS BLOM INCORPORATED

Counsel for the Respondents:

ADV. B T MATLHAPE

Instructed by:

THE OFFICE OF THE STATE ATTORNEY

Date heard:

02 August 2022

Date of judgment:

10 August 2022