



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

Case number: 12178/2015

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: YES/NO
.....	2022/09/28
SIGNATURE	DATE

In the matter between:

WACO AFRICA (PTY) LTD

APPLICANT // PLAINTIFF

And

FORM FORCE (PTY) LTD

FIRST RESPONDENT/DEFENDANT

ISMAIL SADEK

SECOND RESPONDENT/DEFENDANT

HASSAN SULEMAN

THIRD RESPONDENT/DEFENDANT

JUDGMENT (ON APPLICATION FOR LEAVE TO APPEAL)

PHAHLAMOHLAKA A.J.

INTRODUCTION

- [1] On 29 September 2021 I gave Judgement dismissing the Applicants' application in terms of Rule 35(7) and granting the Respondent's application in terms of Rule 21, compelling the Applicants to deliver the further particulars as requested by the Respondent (within 3 days of the judgement).
- [2] The Applicants now seek leave to appeal the entire judgement and orders of this court.
- [3] Section 17(1) of the Superior Courts Act, 10 of 2013 provides that leave to appeal may only be given where the judge or judges concerned are of opinion that, *inter alia*.
- 3.1. The appeal would have a reasonable prospect of success; or
 - 3.2. There is some other compelling reason why the appeal should be heard, including conflicting judgements on the matter under consideration; and
 - 3.3. 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.
- [4] The Respondent raised a point in *limine* contending that the rulings/decisions that the Applicants seek to appeal are not appealable.
- [5] It is trite that Interlocutory orders, generally are not appealable. In **Zweni v Minister of Law and order of the Republic of South Africa 1993 (1) SA 23 (A)** The Supreme Court of Appeal held that:

"Leave is granted if there are reasonable prospects of success. So much is trite. But, if the judgment or order sought to be appealed against does not dispose of all the issues between the parties the balance of convenience must, in addition, favour a piecemeal consideration of the case. In other words, the test then "whether the appeal-if leave were given-would lead to just and reasonably prompt resolution of the real issues between the parties."

- [6] If I find that the judgement or order I made is not appealable that will be the end of this application.
- [7] The Applicant's counsel contended that the judgement or orders I make are appealable. In this regard I was referred to the Supreme court of Appeal judgement of **Caxton and CTP publishes and Printers Limited v Novus Holdings Limited [2022] oL 52490SCA [2022] ZASCA 24 (09 March 2022)**.
- [8] Counsel for the Respondent argued that rulings relating to admissibility, the necessity to discover documents and the provision of the particulars are purely and simply interlocutory in nature, are not appealable, and can merely be attacked as grounds of appeal at the end of the trial hearing of the current matter.
- [9] I agree with Counsel for the Applicant that the orders I made are appealable although Caxton was not dealing with the issues akin to this case.
- [10] The point *in limine* raised by the respondent is therefore dismissed.
- [11] In Caxton, it was held that the central issue on appeal was whether the documents sought by Caxton in terms of its rule 35(12) notice were relevant and therefore ought to be produced for inspection and copying. A further question was whether the report of the independent and impartial person was privileged and thus protected against disclosure. If the report was found to be privileged, it had to be decided whether in quoting virtually the entire conclusion of the report in its answering affidavit Novus had, as a result, waived the privileged attaching to the report.
- [12] Petse J in Caxton concludes as follows:
- "To conclude on this aspect, it is necessary to emphasise that a court considering an application to compel production of the documents or tape recordings which are a subject of a rule 35(12) notice exercise a discretion in a broad sense. A court exercising a discretion in the true sense may properly come to different decisions having regard to a wide range equally permissible options available to it. A discretion in the true sense was described by EM GrosskopfJA in Media*

Association of South Africa and others v Press Corporation of South Africa Ltd (Preskor) in these terms:

The essence of a discretion in these narrower terms is that if the repository of the power follows anyone of the available courses, he would be acting within his powers, and this exercise of power could not be set aside merely because a court would have preferred him to have followed a different course among those available to him.

An appellate court may therefore interfere with the exercise of a discretion in the sense by a court of first instance only if it can be demonstrated that the latter court exercised its discretion capriciously or on a wrong principle, or has not brought an unbiased judgement to bear on the question under consideration, "or has not acted for substantial reasons". In contrast, where the court of first instance exercised a wider or broad discretion an appellate court is in as good a position to exercise this type of discretion improperly."

- [13] I agree with Counsel for the Applicant that if this court has exercised its discretion capriciously then the order of this court may be appealable.
- [14] However, the Applicant has not demonstrated that I exercised my discretion improperly or capriciously and therefore this application for leave to appeal should fail as it lacks merit. In my view the Applicant has not demonstrated that the appeal would have a reasonable prospects of success.
- [15] In the result I make the following order:

The application for leave to appeal is dismissed with costs.

**KGANKI PHAHLAMOHHLAKA
ACTING JUDGE OF THE HIGH
COURT, GAUTENG DIVISION,
PRETORIA**

Delivered: this judgment was prepared and authored by the judge whose name is reflected herein and is handed down electronically and by circulation to the parties/their legal representatives by email and by uploading it to the electronic file of his matter on Caselines. The date for handing down is deemed to be 28 September 2022.

JUDGMENT RESERVED ON : 18 July 2022
FOR THE APPLICANT : Adv Goolam M Ameer SC
INSTRUCTED BY : Kabir Khan Attorneys
FOR THE DEFENDANT : Adv R Raubenheimer
INSTRUCTED BY : Klysbun Edelstein Bosman Du Plessis Inc.
DATE OF JUDGMENT : 28 September 2022