IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG

CASE NO. 3954/2017P

In the matter between:

ABSA BANK LIMITED — **RESPONDENT**
(Applicant in the main application)

and

TRANSCON PLANT AND CIVIL CC — **FIRST APPLICANT**
(First Respondent in the main application)

WESLEY NAIDOO — **SECOND APPLICANT**
(Second Respondent in the main application)

O R D E R

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a) The application for leave to appeal is dismissed with costs on an attorney and own client scale. Such costs are to include the costs of senior counsel as allowed by the Taxing Master.

JUDGMENT IN APPLICATION FOR LEAVE TO APPEAL

HENRIQUES J

Introduction

[1] This is an opposed application for leave to appeal against the judgment and orders which I granted on 19 July 2019.

[2] In light of the Judge President's directives applicable during alert level 4 of the National Lockdown, the parties agreed to have this application decided on the papers with provision for heads of argument and written submissions to be submitted. Only the respondent elected to file heads of argument, the first and second applicants electing not to do so. [1]

Grounds of Appeal

[3] The applicants seek leave to appeal on the following grounds:

(a) 'The Honourable Madam Justice Henriques ("her Ladyship") erred and misdirected herself in finding that the Respondents failure to return the assets referred to in sub-paragraphs 2.4, 2.6 and 2.9 of the Order of 21 April 2016 constituted a wilful and mala fide disobedience of such order;

(b) The Learned Judge ought to have found on a proper conspectus of the papers that the Applicant failed to discharge the onus resting on it to prove beyond reasonable doubt that the disobedience of the Order was committed both *wilful* and *mala fide*;

(c) Annexure "RVE1" to the founding Affidavit at pages to 20 to 23 on a proper interpretation constituted a Warrant of Delivery and not a Court Order. The Learned Judge's Interpretation of such instrument as constituting the order issued on 21 April 2016 was plainly wrong and a misdirection on her part;

(d) There was no evidence whatsoever before the Court that the subject Order was taken by consent between the parties pursuant to agreement reached on 21 April 2016. The Learned Judge's finding in that regard was clearly wrong. It was that erroneous finding that led to her misdirection in concluding that the First Respondent consented to the return of the items reflected in subparagraphs 2.1 and 2.9 of "RVE1" at a point in time after the Respondent's alleged discovery that the items were stolen and hence gave lie to the theft theory;

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[1] Reference to the parties is as they are cited in the application for leave to appeal.

(e) The Order of Court of 21 April 2016 is based on a consent / Confession to Judgment executed by the First Respondent in November 2015. Such Consent to Judgment was at all material times formally on record and constituted part of the material before her Ladyship. In the interest of completeness, a copy of the said consent to judgment is annexed hereto marked **"A"**. It is apparent ex-facie the said document that it was signed by the First Respondent at a point in time long before the latter's discovery of the theft of the items 2.1 and 2.9.

(f) The Learned Judge erred and misdirected herself in concluding that the report to the SAPS that was made by the First Respondent was confined to the theft of item 2.1 alone. The Learned Judge failed to appreciate that the Applicant's notice in terms of Rule 35 (12) for the production of documents specifically sought copies of documents issued by the Kwamvuma SAPS in pursuance of the report of theft under case number 35/01/2016. Such case number related specifically to the theft of item 2.1 and the documentation put up in reply hence fully satisfied the exigency of that request. It was abundantly clear from the answering affidavit of the Respondents at page 76 of the papers that the item reflected in paragraph 2.9 of the relevant Order was indeed reported as stolen to the Howick SAPS under case 206/4/2016. The Applicant's notice in terms of Rule 35 (12) did not seek the production of documentation relating to the SAPS Howick theft report and such was hence neither procured nor produced. Her Ladyship's conclusion the relevant item 2.9 had not been reported as stolen and that the theft theory was a concocted afterthought was completely unwarranted and a misdirection on her part.

(g) Her Ladyship's finding that no case for contempt had been established by the Applicant in respect of items 2.1 should accordingly have been extended to item 2.9 as well.

(h) With regard to item 2.4 and 2.6, the Respondent's allegations that these were at all material times in the possession of a third party, namely Masemanzi Mining, and that the Respondents were unable to retrieve the same so as to enable delivery to the Applicant were not gainsaid or rebutted by the Applicant. The overall onus was on the applicant to negative the version of the Respondents as being false beyond reasonable doubt. The Applicant failed to do so.

(i) It must be remembered that disputes of fact in proceedings in motion fall to be determined on the basis of the Respondents' version of events. The onus is on an

Applicant to seek a referral of disputed questions of fact to oral evidence to establish the version it contends for.

(j) The present matter hence fell to be determined, there being no application for a referral to oral evidence, on the basis of the Respondent's version regarding items 2.4 and 2.6. The Learned Judge's rejection of the Respondents' version beyond reasonable doubt in that regard, without the hearing of oral evidence, was manifestly wrong and a misdirection.

(k) In all the premises, the finding and the conclusion of her Ladyship that the Applicant had established beyond reasonable doubt that the Respondents were in wilful and mala fide disobedience of the Order of the 21 April 2016 were manifestly wrong and misdirected

(l) There is a more than reasonable prospect, in all the circumstances, of a Court of Appeal setting aside the findings and order of her Ladyship.'

[4] Before dealing with the respective grounds of appeal, it is perhaps useful at this juncture to set out the applicable test in applications of this nature, as it is against the applicable test that the merits of the application will be considered.

The test in an application for leave to appeal

[5] Applications for leave to appeal are governed by ss 16 and 17 of the Superior Courts Act 10 of 2013 ('the Act"). Section 17 makes provision for leave to appeal to be granted where the presiding judge is of the opinion that either the appeal would have a reasonable prospect of success or there is some other compelling reason why the appeal should be heard, including whether or not there are conflicting judgments on the matter under consideration.

[6] The applicants have indicated in their notice of application for leave to appeal that the application is premised on the provisions of s 17(1)(*a*)(i). Reasonable prospects of success has previously been defined to mean that there is a reasonable possibility that another court may come to a different decision.[2]

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[2] *Van Heerden v Cronwight & others* 1985 (2) SA 342 (T) at 343I.

[7] With the enactment of s 17 of the Act, the test has now obtained statutory force and is to be applied using the word *'would'* in deciding whether to grant leave. In other words, the test is, would another court come to a different decision. In the unreported decision of the *Mont Chevaux Trust v Goosen*[3], the land claims court held, albeit obiter, that the wording of the subsection raised the bar for the test that now has to be applied to any application for leave to appeal. In *Notshokovu v S*[4], it was held that an appellant faces a higher and stringent threshold in terms of the Act.

[8] In *Acting National Director of Public Prosecutions & others v Democratic Alliance in re: Democratic Alliance v Acting National Director of Public Prosecutions & others*[5], Ledwaba DJP, writing for the full court considered the test as envisaged in s 17 of the Act. At paragraph 25 of the aforementioned judgment, he dealt with the test set out in the *Mont Chevaux Trust* case where Bertelsmann J held the following:

'It is clear that the threshold for granting leave to appeal against the 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 & 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.'

[9] In this particular matter, I would have to determine whether another court *would* (my emphasis) come to a different decision. I have considered the application for leave to appeal and the written submissions filed.

[10] In his heads of argument, Mr *Ramdhani SC,* on behalf of the respondent, unsurprisingly submitted that there are no reasonable prospects of success on appeal and this court did not err when considering the requirements for granting the final relief which the respondent sought in the main application.

Analysis

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[3] *Mont Chevaux Trust v Goosen* 2014 JDR 2325 (LCC) para 6.
[4] *Notshokovu v S* (157/15) [2016] ZASCA 112 (7 September 2016) para 2.
[5] *Acting National Director of Public Prosecutions & others v Democratic Alliance in re: Democratic Alliance v Acting National Director of Public Prosecutions & others* (19577/09) [2016] ZAGPPHC 489 (24 June 2016).

[11] The applicants seek leave to appeal against the entire judgment and orders which I granted on 19 July 2019 pursuant to an opposed application. Paragraph 1 of the order relates to an application for condonation by the applicants for the late filing of their heads of argument. I directed that the applicants' attorney would not be entitled to levy and recover any fees occasioned by the condonation application. Although the grounds of appeal refer to the whole of the judgment and orders which I granted, the applicants have not dealt with paragraph 1 of the order nor do they appear to seek leave to appeal against this order. Consequently, I will deal only with the remaining grounds of appeal advanced by them in this application.

[12] I propose to deal with each ground of appeal raised by the applicants in the application for leave to appeal. It must be noted that this judgment concerned a contempt application in which the existence of the court order, service and notice of such order on the applicants was not an issue. The only issue which the court had to determine was whether or not the applicants were in wilful and *mala fide* disobedience of the court order. The applicants bore an evidentiary burden to show beyond reasonable doubt that they had not acted in wilful and *mala fide* disobedience of the court order of 21 April 2016.

[13] In determining whether or not the applicants had discharged such evidentiary burden, the court took into account that the first applicant was a close corporation who was represented at all material times by the second applicant in his capacity as sole member and manager of the first applicant. The judgment was obtained pursuant to a consent to judgment which was signed by the second applicant on behalf of the first applicant.

Paragraphs (a) and (b) of the grounds of appeal.

[14] In dealing with the missing assets, which were the subject matter of paragraphs 2.1, 2.4, 2.6 and 2.9 of the court order of 21 April 2016, the only explanation which the applicants provided related to the missing assets mentioned in paragraph 2.1 of the order. No explanation and/or corroborating evidence had been provided in relation to the missing assets mentioned in paragraphs 2.4, 2.6 and 2.9 of the court order.

[15] The written judgment at paragraphs 23 to 28 as well as paragraphs 39 to 51 dealt with this aspect. In addition, this court made a finding that the only steps which the applicants took was to make enquiries from Masemanzi Mining regarding the items. From the time of the order being granted on 21 April 2016 up until and including the date of hearing of the opposed application, being 14 February 2018, the applicants took no further steps to place any additional evidence before the court either by way of a supplementary affidavit or an affidavit from Masemanzi Mining. It was for these reasons that this court made a finding that the applicants failed to discharge the evidentiary burden. Consequently, these grounds of appeal are without merit.

Ad paragraph (c) of the grounds of appeal

[16] If one has regard to annexure 'REV1' which appears at indexed pages 20 to 23 of the initial application, such is a court order issued by the registrar of the above Honourable court. It was granted by Acting Justice Xolo in Chambers on reading an application for judgment by confession in terms of rule 31(1)(*c*). There can be no mistake that this was an order of court and not a warrant of delivery as alleged by the applicants. There is thus no merit in this ground of appeal.

Ad paragraphs (d) and (e) of the grounds of appeal.

[17] This ground of appeal is without merit in light of the fact that the order of 21 April 2016 was taken as a consequence of a consent to judgment signed by the second applicant in favour of the respondent. In any event, this ground of appeal clearly contradicts that contained in paragraph (e) of the grounds of appeal where the applicants appear to acknowledge that the document of 21 April 2016 is in fact an order of court which is based on a consent or confession to judgment executed by the first applicant in November 2015 and signed by the second applicant.

[18] In addition, the applicants conceded that the court order existed and was valid and did not at any stage challenge the validity of the order granted. Mr *Ramdhani SC* is quite correct that in paragraph 7 and 8 of the applicants' heads of argument filed in the opposed application, they conceded that the order exists and that notice had been given to the first applicant and further that the first applicant had not complied with the court order.

[19] It is also disingenuous of the applicants to now say that *ex facia* the consent to judgment it was signed in November 2015 prior to the discovery of the theft of the items mentioned in paragraphs 2.1 and 2.9 of the order. The applicants had provided the consent to judgment prior to it being lodged. On the first and second applicants own version in the answering affidavit, negotiations and discussions had taken place between the parties prior to the consent to judgment to being lodged in April 2016.

[20] The judgment deals with this in detail and in addition, at paragraph 35, this court made a finding that the second applicant liaised with the respondent's representative after judgment had been granted and after the warrant of execution had been issued. He indicated in such affidavit that he had advised the respondent's representative of the location of the assets. This court came to the finding in relation to the *mala fides* and wilful conduct of the first applicant based on the second applicant's allegations contained in the answering affidavit.

[21] This court made a finding at paragraph 40 of the judgment that prior to the consent to judgment being filed on 21 April 2016, the applicants were aware of the theft. They were also aware of the theft at the time the warrant of delivery was issued and at the time that the second applicant pointed out the assets to the sheriff. This is also specifically dealt with in paragraphs 39 to 41 of the judgment.

[22] This court pertinently found that at the time that the second applicant met with the respondent's representatives at meetings held on 7 June and 15 June 2016, they failed to inform the respondent that the first applicant was unable to comply with the court order as the assets identified in the court order had already been stolen. This was a material non-disclosure. There is thus no merit in this ground of appeal.

Ad paragraph (f) of the grounds of appeal

[23] In as much as the applicants may allege that they complied with the rule 35(12) notice relating to the production of documents, they miss the point. The applicants bore an evidentiary burden to satisfy the court that their non-compliance with the court order was not wilful and *mala fide*. They ought to have put up documents to discharge this evidentiary burden, alternatively, file affidavits in order to do so. The judgment is specific in relation to the opportunity that they had to do so. As a consequence of their

failure to do so this court made a finding that they failed to discharge the evidential onus. There is thus no merit in this ground of appeal.

Ad paragraphs (g) and (h) of the grounds of appeal

[24] The judgment deals with the failure by the respondents to discharge the evidentiary burden on them and nothing further need be said in this regard.

Ad paragraphs (i) to (j) of the grounds of appeal

[25] It is correct that, in the absence of a request for a referral to oral evidence where disputes of fact arise in motion proceedings, then the court is enjoined to decide the matter on the basis of the applicant's version. However, the difficulty with that submission in relation to these proceedings was that these were contempt proceedings and the applicants bore an evidentiary burden. They elected not to ask for a referral to oral evidence but more importantly there was no dispute of fact on the papers as the applicants had simply not placed any documentary evidence and / or evidence before the court to justifying there being a dispute of fact. Consequently, these grounds of appeal are without merit.

[26] Having regard to the written judgment and the reasons for the orders granted and having reached the conclusion that the applicants grounds of appeal are without merit, it must follow that I find there is no reasonable prospect that another court would arrive at a different finding.

Costs

[27] The agreement which resulted in the contempt application made provision for costs on an attorney and own client scale. Given the fact that these proceedings flow from those proceedings, I will accede to the respondent's request made in the written submissions that the application for leave to appeal should be dismissed with costs on an attorney and own client scale. However, this is an application for leave to appeal and even though the respondent has asked for the costs of senior counsel, in respect of the fees allowed, I will leave to the discretion of the Taxing Master.

[28] In the result the following order will issue:

(a) The application for leave to appeal is dismissed with costs on an attorney and own client scale. Such costs are to include the costs of senior counsel as allowed by the Taxing Master.

HENRIQUES J

CASE INFORMATION

APPEARANCES

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Date allocated for Hearing	:	28 May 2020
Date of Judgment	:	23 June 2020

This judgment was handed down electronically by circulation to the parties' representatives by email, and released to SAFLII. The date and time for hand down is deemed to be 09h30 on 23 June 2020.