IN THE HIGH COURT OF SOUTH AFRICA

WESTERN CAPE DIVISION, CAPE TOWN

CASE NO.: 6189/19

In the matter between:

B XULU & PARTNERS INCORPORATED	**1st Applicant**
BARNABAS XULU	**2nd Applicant**
INCOVISION (PTY) LTD	**3rd Applicant**
(Reg. No. 2017/157169/07)	
SETLACORP (PTY) LTD	**4th Applicant**
(Reg. No.: 2017/21874/07	

And

DEPARTMENT OF AGRICULTURE, FORESTRY AND FISHERIES	**1st Respondent**
THE DEPARTMENT OF ENVIRONMENTAL AFFAIRS, FORESTRY AND FISHERIES	**2nd Respondent**

JUDGMENT ON APPLICATION FOR LEAVE TO APPEAL

ZILWA J

[1] This is an application by the applicants for Leave to Appeal to the Supreme Court of Appeal, alternatively to the Full Bench of this Court against the whole judgment and orders that I granted on 05 August 2021.

[2] The application for Leave to Appeal that was filed by the applicants on 12 August 2021 is not a model of clarity. It is couched in non-specific terms, making it difficult to discern the actual grounds of appeal relied on. It is premised on seven (7) main headings, which are:

(a) Mischaracterisation of the piercing of the corporate veil remedy and the absence of a constitutionally grounded approach;

(b) Reasoning by pejorative;

(c) A partial and lopsided analysis of the facts of this case;

(d) Verification;

(e) Judicial estoppel;

(f) On lien; and

(g) Waiver.

[3] Upon reading the Application for Leave to Appeal I experienced difficulty in capturing and understanding the actual grounds of appeal. In consequence thereof at the commencement of the actual hearing of the Application for Leave to Appeal I requested the applicants' counsel, Mr Shai, to explain to me in succinct form the grounds of appeal relied on.

[4] Very helpfully Mr Shai stated that the intended appeal is based on two (2) main grounds, namely, that there is a reasonable possibility that another court will find that:

(i) this court failed to sufficiently traverse and take cognisance of certain critical provisions of the Constitution;

(ii) this court erred in finding that a proper verification exercise as envisaged in the main Rogers J judgment was done by the respondents.

Mr Shai stated that all the other grounds cited in the Application for Leave to Appeal are contingent on these two (2) grounds.

[5] In argument it was submitted that in my judgment I should have approached the matter on the basis that the applicants had been trapped by the respondents' departments which had blown hot and cold, both conceding as well as denying owing the applicants. The 1st applicant, which had been established in 2016, had been set up and funded by the 2nd applicant who had advanced loans and start-up capital to the 1st applicant and which loans had to be and were in fact repaid from the funds that form the subject matter of the application. Mr Shai correctly conceded that these contentions were not properly pleaded in the 1st and 2nd applicants' papers in the main application.

[6] Mr Shai further submitted that this matter raises constitutional issues which were not properly considered by the court. He further argued that there is a reasonable possibility of another court finding that at the time that the 2nd applicant had attached the funds in issue it had done so on the strength of the court order that was granted by Steyn J. He argued that had the court properly considered and applied the provisions of 165 (5) of the Constitution it would have found that the attachment of the funds in issue was properly done. He, however, conceded that the court order had to be used properly and not abused e.g. by attaching funds from other accounts that are not mentioned in the court order.

[7] I cannot find any merit to this argument and I am not persuaded that there is a reasonable prospect of the appeal succeeding on this ground. Amongst other things, quite apart from the questionable manner in which the order of Steyn J was sought and obtained by the applicants, the order never authorized the attachment and utilization by the 1st and 2nd applicants of the funds from the respondents' bank accounts from which the unlawfully obtained funds were in fact taken before being dissipated by the applicants. That can only result in the ineluctable conclusion that the court order in question was in fact abused and

utilized to achieve an objective that was never authorized by it. I am not persuaded that there is any reasonable possibility of another court finding otherwise or concluding that this court's approach to the whole matter on the facts before it does not pass constitutional muster. In the premises I am of the view that the first main ground of the intended appeal, in all its permutations, is without substance and it has to fail.

[8] It was further argued on behalf of the applicants that this court erred in its approach to the question of the piercing of the corporate veil in that not every wrong action of a director of a company should result in the piercing of the corporate veil.

[9] This court's judgment in issue has dealt at length with the requirements for the piercing of the corporate veil before coming to the conclusion that on the facts of this case and on binding authority a proper case had been made for such piercing. Once again I am not persuaded that there is a reasonable possibility of another court (the Court of Appeal) finding otherwise.

[10] The second main ground on which this application is premised is the alleged reasonable possibility of another court finding that this court had erred in finding that a proper verification exercise as envisaged in the main Rogers J judgment was done. Once again I am not persuaded that there is any reasonable possibility of another court finding otherwise. In paragraphs 29 and 30 of its judgement this court has adequately dealt with the issue of the verification exercise envisaged in the main Rogers judgment before arriving at the conclusion that the respondents did properly comply with the verification requirement envisaged in the judgment.

[11] It was pointed out in argument by Ms Bawa SC, who appeared for the respondents, that during argument in the application for leave to appeal the main Rogers J judgment it had been clearly conceded by Mr Bridgman, who appeared for the 1st and 2nd applicants in that application, in the presence of the 2nd applicant that the verification exercise that had been ordered had in fact been done. I was informed that the application to the Supreme Court of Appeal for leave to appeal the main Rogers J judgement, in which application the verification challenge is also raised, was refused on 6 September 2021. Moreover, when the issue of verification was traversed before Slingers J, the learned judge had also refused to hold that the verification process ordered by Rogers J had not been properly completed.

[12] In the circumstances I am not persuaded that there is a reasonable possibility of another court finding otherwise on that aspect.

[13] In argument, Ms Bawa SC submitted that none of the grounds of appeal set out in the Application for Leave to Appeal (some of which raise issues that had never been raised in the main application) have any substance.

[14] In response to the applicants' submission that the 1st applicant was owed monies by the respondents and it had never been paid, Ms Bawa SC pointed to paragraph 20 of Mr Abader's affidavit on page 4315 of the record, which points out that between 24 April 2017 and 13 June 2018 the 1st applicant was in fact paid an amount of no less than R21 507 989.91, which payment is admitted by the 2nd applicant himself. This was before the applicants had proceeded to unlawfully take the amount that forms the subject matter of the main application, meaning that the 1st applicant was in fact overpaid.

[15] Upon careful consideration of the application for leave to appeal and the arguments adduced by the parties at the hearing thereof I am of the view that the intended appeal has no reasonable prospects of success in that there is no reasonable possibility that another court would come to a different conclusion and there is no other compelling reason why it should be heard.

[16 In the result, **the application for leave to appeal is dismissed with costs.**

P ZILWA
JUDGE OF THE HIGH COURT
BHISHO

Counsel for the Applicants:	MR SHAI
Instructed by:	Ndumiso Attorneys Studio 508 4 Loop Street Cape Town

Counsel for the 1st & 2nd Respondents:	MS BAWA SC with Mr Joseph SC
Instructed by:	The State Attorney Cape Town

Date Heard: 23 September 2021

Judgment Delivered: 15 October 2021